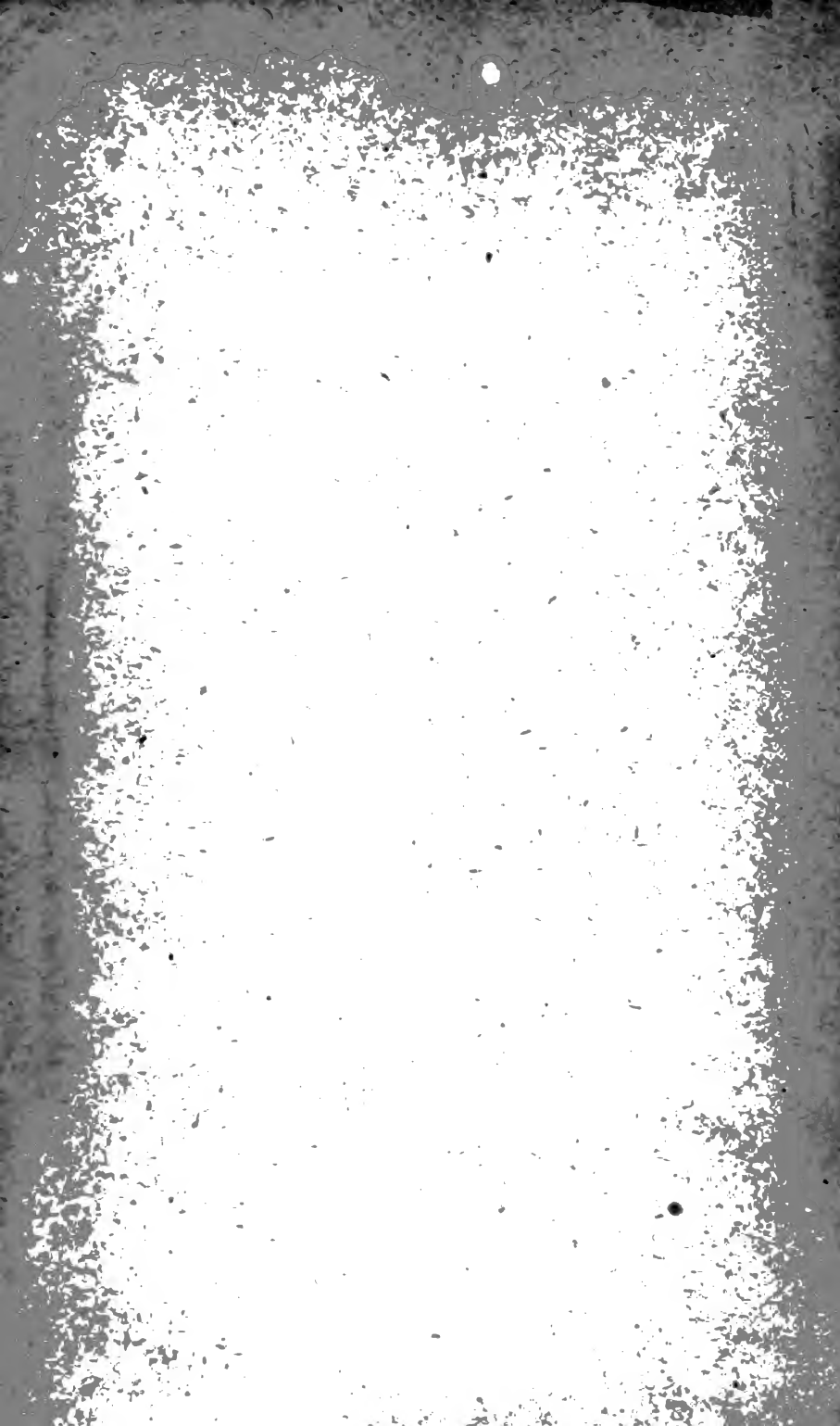




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CONSTITUTIONAL LAW

VIEWED IN RELATION TO

COMMON LAW,

AND

EXEMPLIFIED BY CASES.

BY

HERBERT BROOM, LL.D.,

AUTHOR OF "A SELECTION OF LEGAL MAXIMS;" "COMMENTARIES ON THE COMMON LAW," ETC.

SECOND EDITION.

BY

GEORGE L. DENMAN, LL.M.

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PREFACE

TO THE SECOND EDITION.



No endeavour has been made in this edition to depart from the plan of the work originally undertaken by the late Dr. Broom, as explained by him in his Preface.

Since the date of the first edition comparatively few cases have arisen calling for an application of the principles discussed, but reference has been made, either in the text or foot-notes, to all new cases which have appeared to the Editor to have a sufficiently direct bearing upon such principles. It is therefore hoped that the present volume will be found to contain a correct exposition of the present state of Constitutional Law in its relation to the Common Law.

The Editor has, with a view to limiting the bulk of the volume, endeavoured to make room for the necessary

additions by somewhat further abbreviating the reports of some of the Leading Cases, but he has been careful in so doing to omit no matter of importance contained in the original reports.

GEORGE L. DENMAN.

2, DR. JOHNSON'S BUILDINGS,
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24 *March*, 1885.

FROM THE
PREFACE TO THE FIRST EDITION.

SOME few years since, adopting a suggestion made to me by Mr. Phinn, Q.C., Counsel to the Admiralty, I applied myself to the task of selecting and illustrating, mainly out of our Reports, a series of Leading Cases upon Constitutional Law ; my idea having been to arrange them chronologically, without any attempt at classification, and to exemplify their significance in annotations as concise as possible appended to the Cases. The idea, thus originally suggested, I have been induced to modify—1st, by limiting the scope of my undertaking in the manner indicated by its present title ; 2ndly, by arranging the Cases and grouping them together, after due consideration of their relation to and bearing on each other.

Difficulties neither few nor insignificant have to be encountered by the Student who, for acquiring knowledge of the Principles of our Constitution, applies himself to reported Cases. Of course he must be guided in his search ; yet even when a case is placed before him for perusal, he may feel himself perplexed, not merely by

the length to which the report of it extends, but by the quaintness of the language used in it,—the technicality of expressions and wearisomeness of the repetitions which abound in it.

I have endeavoured to mitigate these evils by abridging some of the cases here presented, modernizing phraseology, and explaining, usually in foot-notes, peculiarities occurring in them.

Respecting the title, the design, and plan of this Volume, some brief remarks may be deemed proper, albeit a glance at the Table of Contents might explain the latter. By Constitutional Law I would be understood to mean the aggregate of doctrines and sanctions directly tending to the maintenance of our social union. By Common Law I would be understood to signify the aggregate of rules and maxims written or customary, directly tending to the maintenance of private rights—to the enforcement of private remedies. Constitutional Law I would regard as applying itself to the solution of questions which concern the Sovereign, the State, the cohesion of Society ; whereas Common Law applies itself to resolving questions between party and party, questions of a strictly private nature, uninteresting to, because unaffecting, the community at large. According to this view, the relation of Constitutional to Common Law is that of law regulating and assuring the stability of the Empire to law regulating and assuring the maintenance of private rights. Nor is the circumstance

material, that by the same Tribunals the one or the other species of Law is freely and indifferently administered.

The relation of Constitutional to Common Law cannot be determined by reference to the Tribunal administering either. It must, if at all, be so by analysing the ingredients in the matter submitted for examination, by scrutinizing its tendency, whether it be (if I may adapt to my purpose the words of our great commentator (a)) to affect, hurt, or endanger the constitutional government of this island, or to destroy the equilibrium of power between one branch of our Legislature and the rest. Nor need we be perplexed at finding in cases litigated between merely private persons an occasional recognition of those great and leading principles on which our Constitution rests.

By such considerations have I been guided in selecting the ensuing Cases. I have inserted such only as exhibit the leading principles of Constitutional Law, and have arranged them under three heads, showing the Relation of the Subject—I. To the Sovereign; II. To the Executive; III. To Parliament; the first specified of these heads naturally subdividing itself, inasmuch as the duties of the Sovereign and the Subject are reciprocal and mutual.

Of some of the Judgments and Arguments set forth in these pages it would scarcely be possible to speak in

(a) 1 Bla. Com., 21st ed. p. 51.

terms of too high admiration. They are models to which our Judges may willingly recur, and to which our leading Advocates must have recourse—models of elaborate and subtle reasoning, of exhaustive analysis, of majestic eloquence.

As regards the Notes appended to the Cases, I have therein aimed at conciseness, and have eschewed the theoretical in favour of the practical. In these annotations I am not conscious of having avoided difficulties, though I have declined to enter upon topics which are discussed at length in Treatises ordinarily accessible or in Books of Practice deservedly familiar.

HERBERT BROOM.

THE PRIORY, ORPINGTON,

Jan. 1, 1866.

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ADDENDA ET CORRIGENDA.

- Page 17, n. (b), line 4, for "by" read "since." •
- „ 233, n. (q), after the word "grant" insert "of land or."
- „ 235, n. (a), *Goldsmid v. Great Eastern Railway Company*, add reference to 9 App. Cas. 927.
- „ 362—6 in margin, for "Argument" read "Opinion."
- „ 655, n. (z), for "*Reg. v. Pinney*" read "*R. v. Pinney*."
- „ 768, l. 14, and in margin pp. 768, 769, for "*Lord Downes*" read "*Downes*."

CONSTITUTIONAL LAW

VIEWED IN RELATION TO

COMMON LAW.

It is purposed in this volume to consider the relation of the Subject to the Crown, to the Executive, and to Parliament; the rights and duties incident to each such relation; the liabilities originating out of it. Obviously the inquiry now hinted at would, if completely carried out, extend itself over the entire field of Constitutional Law, and of the *lex et consuetudo Parliamenti*. The subject, however, will here be considered so far only as it is connected with the Common Law, and as it may be illustrated by decided cases or by the Statute Book.

The plan proposed may thus be explained and vindicated: 1st. The Subject may be viewed in his relation to the Sovereign power of the realm; the tie which binds him to it may be examined; the duties which he owes to it may be investigated; the means of redress which he has against it may be specified; and so reciprocally may the obligations imposed on the Sovereign towards his subjects be examined, and the position occupied by the Sovereign relatively to them be defined. 2ndly. The Executive Department of the State puts in force and executes the laws: it is distinguishable from that which

deliberates and legislates (a). The Executive acts through public servants and officials, civil, military, or naval; and in Part II. of this volume an endeavour will be made to show what are the rights of the Subject against such public officers,—what are the immunities specially extended to these latter. 3rdly. Will be discussed the relation of the Subject towards Parliament, and the conflict which has ere now occurred (even in our own time), and may again be possible, between the Common Law of England and the Law of Parliament. This threefold relation of the Subject to the Sovereign, to the Executive, and to Parliament having been considered, the way will be open to the student for inquiring as to the relations of subjects *inter sese*—for investigating the contracts which may exist between them, the wrongs which may be done or suffered by them, the crimes of which they may be guilty.

(a) Todd's Johns. Dict. *ad verb.*

PART I.

RELATION OF THE SUBJECT TO THE SOVEREIGN.

IN this Part will be considered, 1st; the duties of the subject towards the sovereign; 2ndly, the duties of the sovereign towards his subjects.

SECTION I.

DUTIES OF THE SUBJECT TOWARDS THE SOVEREIGN.

The duties of the subject towards the sovereign are mainly indicated by the word "allegiance" (*b*), and are thus concisely set forth in the oath prescribed by the statute 31 & 32 Vict. c. 72, sec. 2 (*c*):—"I, A. B., do swear that I will be faithful and bear true allegiance to her Majesty Queen Victoria, her heirs and successors, according to law. So help me God" (*d*).

(*b*) "With us in England, it becoming a settled principle of tenure that all lands in the kingdom are holden of the king as sovereign and lord paramount, no oath but that of fealty could ever be taken to inferior lords, and the oath of allegiance was necessarily confined to the person of the king alone. By an easy analogy the term of allegiance was soon brought to signify all other engagements which are due from subjects to their prince, as well as those duties which were simply and merely territorial." 1 Bla.

Com. 367.

"The oath of fealty," says Chancellor Kent, 3 Com., 10th ed. 678, "was the parent of the oath of allegiance which is exacted by sovereigns in modern times."

(*c*) See also 33 Vict. c. 14, s. 9; and 33 & 34 Vict. c. 102. The above form of oath is not affected by the Promissory Oaths Act, 1871 (34 & 35 Vict. c. 48).

(*d*) Sec. 11 provides a form of affirmation in lieu of the above oath.

The nature of the tie of allegiance, of which this statutory oath is the outward declaration, may fitly be illustrated by—

CALVIN'S CASE, 7 Rep. 1; 2 St. Tr. 559 (c).
(6 Jac. 1, A.D. 1608.)

ALLEGIANCE—WHAT IT IS, BY WHOM AND TO WHOM IT IS DUE.

Held that persons born in Scotland after the accession of James I. to the crown of England were not aliens but capable of inheriting land in England (f).

The question in this case was whether the *postnati*, or those born in Scotland after the accession of James I. to the crown of England, were in this latter country to be deemed aliens or natives. As to the *antenati*, all seem

(c) This was an assize of novel disseisin by Robert Calvin against Richard Smith and Nicholas Smith. See Booth on Real Actions, 211.

(f) An alien born was not, by the policy of the common law, capable of inheriting land in England, for which three reasons have been assigned. "1st. The secrets of the realm might thereby be discovered. 2ndly. The revenues of the realm might be taken and enjoyed by strangers born. 3rdly. It would tend to the destruction of the realm (1) *tempore belli*—for then strangers might fortify themselves in the heart of the realm to the peril of the commonwealth; (2) *tempore pacis*—for so might many aliens born get a great part of the inheritance and freehold of the realm, whence might follow a failure of justice (7 Rep. 18, b.; *Holland's Case*, Styles, R. 20; O. Bridgm. 431), inasmuch as aliens

born cannot be returned to serve on juries for the trial of issues between the king and the subject or between subject and subject." 7 Rep. 18, b.; 1 Arch. Pr., 13th ed. 386. [See now as to juries 33 & 34 Vict. c. 77, secs. 6 & 8.]

Neither at common law could an alien born take land by grant, devise, or other purchase, for his own benefit. The Crown became entitled to land thus taken. *Duplessis v. Att.-Gen.*, 1 Bro. P. C. 415; S. C., 2 Ves. 286; Parker, 144; *Page's Case*, 5 Rep. 52, a. See *Barrow v. Wadkin*, 24 Beav. 1, 327; 27 L. J. Ch. 129; per Tindal, C. J., *Pisani v. Lawson*, 6 Bing. N. C. 95; *Sharp v. St. Sauveur*, L. R. 7 Ch. App. 343; 41 L. J. Ch. 576; *De Geer v. Stone*, 22 Ch. D. 243; 52 L. J. Ch. 57. For the statutory modifications of this rule, see *post*, p. 55.

to have agreed, that they remained aliens. But there was a great difference of opinion about the condition of the *postnati*. The king, anxious for everything which might tend to consolidate the island into one kingdom, was eager to have it declared as law, that the union of the crowns effected a mutual naturalization of the *postnati* in the two countries. And the commissioners appointed by the respective parliaments of England and Scotland to treat for an union of government and laws, followed the king in this policy ; for they resolved to propound to both parliaments a declaration of the law to that effect. But when this proposition was made, the English house of commons were found averse to it. It was therefore determined to settle the point out of parliament by resorting to the English courts of justice (*g*). For this purpose, two suits were instituted in the name of Robert Calvin, a *postnatus* of Scotland and an infant ; one in the King's Bench for the freehold of certain land ; and the other in Chancery for detainer of writings concerning the title to the same estate : in each suit the defendants pleaded (*h*) in abatement, that the plaintiff was an alien born in Scotland since the king's accession to the crown of England (*i*). A demurrer to this plea raised the intended question about the *postnati* ; for if

CALVIN'S
CASE.
—

(*g*) As to the proceedings in *Calvin's Case*, see, further, Moore, R. 790 ; Argument of Lord Ellesmere, 2 St. Tr. 661-663 ; 6 Hume, Hist. Eng. 42 ; 1 Cobbett, Parl. Hist. 1018, 1027, 1069, 1071, 1078, *et seq.* ; and 1 Hallam, Const. Hist. Eng. 310 (*n*).

(*h*) The plea in the action at law alleged that, "the said Robert is an alien, born on the 5th day of Nov. in the 3rd year of the reign of the king that now is, of England, France, and Ireland, and of Scotland the 39th, at Edinburgh, within his kingdom of Scotland aforesaid, and within the

allegiance of the said lord the king of the said kingdom of Scotland, and out of the allegiance of the said lord the king of his kingdom of England ; and at the time of the birth of the said Robert Calvin, and long before, and continually afterwards, the aforesaid kingdom of Scotland, by the proper rights, laws, and statutes of the same kingdom, and not by the rights, laws, or statutes of this kingdom of England, was and yet is ruled and governed," concluding with a verification.

(*i*) As to the plea that plaintiff is

CALVIN'S
CASE.

Calvin was an alien, he could not maintain either suit (*k*). These causes were adjourned into the Exchequer Chamber (*l*) in order that the solemn opinion of the judges upon the question raised might be obtained.

On behalf of the defendants it was thus argued:—

Arguments
for defen-
dants.

I. There are two *ligeances* (*m*), one of England, and another of Scotland; and (1) Whosoever is born within the allegiance of King James of his kingdom of Scotland is an alien born as to the kingdom of England; (2) Whosoever is born out of the allegiance of King James of his kingdom of England is an alien as to the kingdom of England.

II. The second argument was threefold. (1) *Quando duo jura (imo duo regna) concurrunt in unâ personâ æquum est ac si essent in diversis* (*n*). Now in the king's person concur two distinct and several kingdoms; therefore it is all one, as if they were in divers persons, and, consequently, the plaintiff is an alien, having been born under the allegiance of another king. (2) Whatsoever is due to the king's several politic capacities of the several

an alien, Bracton (*temp.* Hen. 3, says, lib. iii. c. 24, fo. 427, "*Est etiam alia exceptio quæ competit ex personâ quærentis propter defectum nationis*:" *acc.* Fleta (*temp.* Edw. 1), lib. vi. c. 47; Glanville (*temp.* Hen. 2), lib. ix. c. 1.

(*k*) *Supra*, p. 4, n. (*f*).

(*l*) Into this court were sometimes adjourned from the other courts such causes as the judges upon argument found to be of great weight and difficulty—before any judgment had been given upon them in the court below. 3 Steph. Com. 337; *per* Bacon, *arg.*, 2 St. Tr. 577.

(*m*) "*Ligeance*" from *ligare*—*ligamen fidei*. Toml. L. Dict. *ad verb.*; *post*, p. 25. Henceforth the modern word "*allegiance*" will be

used in the abridgment of case *supra*, derived from "*alligare*," *metaphorice se alligat, qui sese obligat*: Brissonius, *ad verb.*

(*n*) A maxim "the words whereof are taken from the civil law; but the matter of it is received in all laws, being a very line or rule of reason to avoid confusion." *Per* Bacon, *arg.*, 2 St. Tr. 584. The maxim signifies that "when two rights do meet in one person there is no confusion of them, but they remain still in the eye of the law distinct as if they were in several persons." *Ib.* 589. See further, as to this maxim, Moore, 793, 804; Cawley, 209; 4 Rep. 118, a.; 2 St. Tr. 633; Broom, Leg. Max., 6th ed. 492.®

kingdoms of England and Scotland, is several and divided; but allegiance of each nation is due to the king's several politic capacities of the several kingdoms; *ergo*, the allegiance of each nation is several and divided, and consequently, the plaintiff is an alien, inasmuch as they that are born under several allegiances are aliens one to another. (3) Where the king hath several kingdoms by several titles and descents, there also are the allegiances several.

CALVIN'S
CASE.
—
Arguments
for defen-
dants.

III. The third argument for the defendants was likewise threefold. (1) A subject born out of the reach of the laws of England cannot by judgment of those laws be a natural-born subject of the king, in respect of his kingdom of England. (2) A subject who is not at the time and in the place of his birth inheritable to the laws of England cannot be inheritable to, or partaker of, the benefits and privileges given by the laws of England. (3) Whatsoever appears to be out of the jurisdiction of the laws of England cannot be tried by those laws; but the plaintiff's birth at Edinburgh is out of the jurisdiction of the laws of England; therefore the same cannot be tried by the laws of England.

IV. Every subject who is *alieni gentis*, i.e., *alienæ ligentiae*, is *alienigena*; but such a one is the plaintiff (o).

On behalf of the plaintiff in this case, the arguments mainly urged may be thus classified :—

Arguments
for the
plaintiff.

I. As to allegiance—what it is—the several kinds of

(o) The main point at issue in *Calvin's Case* is thus stated by Lord Bacon, *arg.*, 2 St. Tr. 577. It is confessed, he says, that if the two realms of England and Scotland were united under one law and one parliament, and thereby incorporated and made as one kingdom, the *post-natus* of such an union would be naturalized. It is confessed that

both realms are united in the person of our sovereign—that one and the same natural person is king of both realms. It is confessed that the laws and parliaments are several. So whether the privilege and benefit of naturalization be an accessory to, or dependency upon, that which is one and joint, or that which is several, is the question.

CALVIN'S
CASE.
—
Argument
for plaintiff.

allegiance—where allegiance is due—to whom it is due—how it is due—in virtue of what law it is due.

II. As to aliens. Who is an alien born—how many kinds of aliens there are—incidents to the *status* of a subject born.

III. The argument *ab inconvenienti*.

What alle-
giance is.

I. As to Allegiance. Allegiance is a true and faithful obedience of the subject due to his sovereign. It is an inseparable incident to every subject; as soon as he is born, he owes by birth-right allegiance and obedience to his sovereign. Between the sovereign and the subject there is even a higher and greater connexion than that between lord and tenant; for as the subject owes to the king true and faithful allegiance and obedience, so the sovereign is to govern and protect his subjects, *regere et protegere subditos suos*; so that between the sovereign and subject there is *duplex et reciprocum ligamen*; *quia sicut subditus regi tenetur ad obedientiam, ita rex subdito tenetur ad protectionem* (p). Therefore it is truly said, *protectio trahit subjectionem, et subjectio protectionem*. Hence persons born under the obedience, power, faith, or allegiance of the king, are natural subjects and no aliens.

The several
kinds of
allegiance.

Our law recognizes four kinds or species of allegiance (q). (1) *Ligeantia naturalis, absoluta, pura et indefinita*, which originally is due by nature and birthright, he who owes it being called *subditus natus*. (2) *Ligeantia acquisita, i.e.*, allegiance not by nature but by acquisition or denization

(p) "Allegiance is the mutual bond or obligation betwixt the master and the servant. *Item*, the mutual bond and obligation betwixt the king and his subjects whereby we are called his lieges, because we are bound and obliged to obey and serve him. And he is called our liege

king because he should maintain and defend us." Skene, De Verb. Signif. 88.

(q) In distinguishing these species, says Lord Coke (7 Rep. 5, b.), we need to be very wary, for *ubi lex non distinguit, nec nos distinguere debemus*.

—a denizen, or rather *donaizon*, being so called because he is *subditus datus* (r). (3) *Ligeantia localis*—allegiance wrought by the law, as when an alien *ami* comes into England, so long as he is within England he is within the king's protection, and therefore owes unto the king a local obedience or allegiance. (4) Legal allegiance, so called because the municipal laws of this realm have prescribed the order and form of it; it is constituted by oath taken at the tourn or leet. Of each of these kinds or species of allegiance in their order:—

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for plaintiff.

The legal significance of the expression “natural allegiance” appears from Acts of Parliament, wherein the king is termed natural liege lord, and his people natural liege subjects (s). It also appears by the indictment for treason when committed by one owing natural allegiance to the Crown (t).

Natural
allegiance.

Ligeantia acquisita, or denization, is threefold: (1) absolute, as the common denization—to a man and his heirs without any limitation or restraint; (2) limited, as when the king grants letters of denization to an alien and to the heirs male of his body, or to an alien for the term of his life; or (3) it may be granted upon condition, for *cujus est dare ejus est disponere* (u).

Denization.

The denization of an alien may be effected in three ways, by Parliament, by letters patent, and by conquest, for if the king and his subjects should conquer another kingdom, as well *antenati* as *postnati*, as well they which fought in the field as they which remained at home for defence of their country, or were employed elsewhere, become denizens of the conquered kingdom.

As there may be a local protection on the king's part, so there may be a local allegiance on the subject's part. Thus—Sherley, a Frenchman, being in amity with the

Local alle-
giance.

(r) Co. Litt. 129, a.

(s) See 16 Ric. 2, c. 5; 11 Ric. 2, c. 1; and 14 Hen. 8, c. 2,—where aliens are spoken of as “born out of

the king's obeisance or *alien-born*.”

(t) 7 Rep. 5, b.

(u) Leg. Max. 6th ed. 430; *Cromwell's Case*, 2 Rep. 71, b.

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king, came into England and joined with divers subjects of this realm in treason against the king and queen, and the indictment concluded *contra ligeantiae suae debitum* (x); for Sherley owed to the king a local obedience so long as he was within the king's protection (y), and such local obedience, although momentary and uncertain, is yet strong enough to make a natural subject, for if he have issue here, that issue is a natural-born subject (z); *a fortiori*, he who is born under the natural and absolute allegiance of the king (as the plaintiff in this case was) must be a natural-born subject. And it is to be observed, that it is *nec cœlum, nec solum*, neither the climate nor the soil, but *ligeantia* and *obedientia* that make the subject born; for if enemies should come into the realm, and possess a town or fort, and have issue there, that issue is no subject to the king of England, though he be born upon his soil, because he was not born under the allegiance of a subject, nor under the protection of the king. And concerning this local obedience, a precedent occurred in 36 Eliz. when De Gama and Tinoco, two Portuguese born, coming into England under Queen Elizabeth's safe conduct, and living here under her protection, joined with Lopez in treason within this realm against her Majesty (a); and in this case two points were resolved by the judges. 1st. That the indictment ought to begin, that the accused intended treason *contra dominam reginam*, &c., omitting the words *naturalem dominam suam*, and ought to conclude *contra ligeantiae suae debitum* (b). 2ndly. That if an alien enemy come to invade this realm, and be taken in war, he cannot be indicted of treason (c); for the indictment cannot conclude *contra ligeantiae suae debitum*, because he never was in the pro-

(x) *Courteen's Case*, Hob. 271; Hume, Hist. Eng. 373.
Co. Litt. 129, a.; Cawley, 184. (b) Dyer, 145, pl. 62; Cawley,
(y) *Sherley's Case*, Dyer, 144, a. 185; Hob. 271; *R. v. Cranburne*,
(z) Co. Litt. 8, a.; Dyer, 224. 13 St. Tr. 227.
(a) As to this conspiracy, see 5 (c) 3 Inst. 11.

tection of the king, nor ever owed any manner of allegiance unto him, and therefore he shall be amenable to martial law. And so it was in Perkin Warbeck's case (*d*) (*temp.* Hen. VII.), who, being an alien born in Flanders, feigned himself to be one of the sons of Edward IV., and invaded this realm with intent to assume the royal dignity; but being taken in the war, it was resolved by the justices, that he could not be punished by the common law, but must be tried before the constable and marshal who had special commission under the great seal to hear and determine the matter according to martial law, and by them Warbeck had sentence to be executed.

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for plaintiff.

Legal allegiance is sometimes called suit royal, because the allegiance of the subject is only due unto the king. The oath of allegiance appears in Britton (*e*) (*temp.* Edw. I.), and is yet commonly in use in every leet (*f*). The substance and effect hereof is due by the law of nature, *ex institutione naturæ*. The form and addition of the oath being *ex provisione hominis* (*g*).

Legal alle-
giance.

By "allegiance" in the case in question is meant and intended the first kind of allegiance, *i.e.*, allegiance natural, absolute, &c., due by nature and birthright. But if the

(*d*) 3 Hume, Hist. Eng. 35 *et seq.*

(*e*) Chap. 29.

(*f*) "For many ages after the Conquest it was the custom to assemble in the court leets and sheriff's tourns all persons of inferior condition, who had attained the age of twelve, and to exact from them an oath of fealty to the king." Allen, Prerog. Cr. 64; 1 Steph. Com. 176; Co. Litt. 68, b. See further, as to the oath at the leet, and those who were exempted from taking it, Argument of Lord Ellesmere, 2 St. Tr. 683.

As to the tourn and the leet, see 1 Reeves, Hist. Eng. Law, 16 (Ed. 1869); *Griesley's Case*, 8 Rep. 38, a.

These courts have gradually fallen into desuetude, and "their business hath for the most part gradually devolved upon the Quarter Sessions, which it is particularly directed to do in some cases by stat. 1, Edw. 4, c. 2." 4 Bla. Com. 274.

The form of the oath of allegiance now in force is given *ante*, p. 3.

(*g*) See the *Proceedings against Crook and others* for refusing to take the oaths of allegiance and supremacy, 6 St. Tr. 201; the *Proceedings against Fell and Fox*, *Id.* 629; and against *Hales*, 11 *Id.* 1165; *Godden v. Hales*, 2 Show. 475. See also 1 East, P. C. chap. 1, s. 19.

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for plaintiff.

plaintiff's father be made a denizen, and purchase lands in England to him and his heirs and die seised; this land shall never descend to the plaintiff, because the king by his letters patent may make a denizen, but cannot naturalize him to all purposes as an Act of Parliament may do; neither can letters patent make any inheritable in this case who by the common law cannot inherit (*h*).

Allegiance—
where due

It appears by stats. 11 Hen. 7, c. 18 (*i*), and 2 Edw. 6, c. 2, that the subjects of England are bound by their allegiance to go with the king in his wars as well within the realm as without. And therefore if Ireland or any other of his Majesty's dominions be invaded, or be in a state of insurrection, the king of England may send his subjects out of England, and out of Scotland also, into Ireland for resisting or suppressing the same. And so may his subjects of Guernsey, Jersey, Isle of Man, &c., be commanded to make their swords good against either rebel or enemy as occasion shall be offered. Whereas if natural allegiance of the subjects of England were local, *i. e.* confined within the realm of England or Scotland, &c., they would not be bound to go out of either country (*k*). In the 25 Edw. 1, Bigot, Earl of Norfolk and Suffolk and Earl Marshal of England, and Bohun, Earl of Hereford and High Constable of England, exhibited a petition to the king on behalf of the commons of England, concerning how and in what sort they were to be employed in his

(*h*) *Collingwood v. Pace*, O. Bridgm. 426; *post*, p. 47.

(*i*) The preamble of this statute recites that "every subject, by the duty of his allegiance, is bounden to serve and assist his prince and sovereign lord at all seasons when need shall require." *Et vide* 19 Hen. 7, c. 1. Both these statutes are repealed by 26 & 27 Vict. c. 125.

(*k*) In 2 Inst. 47, 48, Lord Coke, commenting upon the 29th chapter of Magna Charta, observes that "by

the law of the land no man can be exiled or banished out of his native country but either by authority of parliament or in case of abjuration or felony by the common law." "This," he further remarks, "is a beneficial law and is construed beneficially, and therefore the king cannot send any subject of England against his will to serve him out of this realm, for that should be an exile and he should *perdere patriam*."

Majesty's wars out of the realm of England, and the record says that, *post multas et varias altercationes*, it was resolved that they ought to go in such manner and form only as was afterwards specified in the said statutes, which seem to be but declaratory of the common law (l).

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for plaintiff.

Now since power and protection draw allegiance, and since the king's power, command, and protection extend out of England, allegiance cannot be local, or confined within the bounds thereof. He who has abjured the realm, *qui abjurat regnum, amittit regnum, sed non regem; amittit patriam, sed non patrem patriæ* (m): for notwithstanding the abjuration, he owes the king his allegiance, and he remains within the king's protection; for the king may pardon and restore him to his country again. Seeing then that allegiance is a quality of the mind, and not confined within any place; it follows that the plea (n) confining the allegiance of the plaintiff to the kingdom of Scotland, *infra ligeantiam regis regni sui Scotiæ, et extra ligeantiam regis regni sui Angliæ*, whereby the defendants make one local allegiance for the natural subjects of England, and another local allegiance for the natural subjects of Scotland, is utterly insufficient, and against the nature and quality of natural allegiance. So this point was concluded, *quod ligeantia naturalis nullis claustris coercetur, nullis metis refrænatur, nullis finibus premitur*.

Allegiance being due only to the king, the next question is, *quomodo debetur*. It is true that the king has two capacities in him: one a natural body, being descended of the blood royal of the realm, and this body is of the creation of Almighty God, and is subject to death, infirmity, and such like: the other is a politic body or

Allegiance
—to whom,
and how
due.

(l) The refusal of the earls above mentioned and other barons and freeholders to attend King Edward I. into Flanders led to the granting of the charter *De Tallagio non concedendo* (34 Edw. 1, st. 4), of which

see particularly c. 5. Compare 2nd Inst. 528, 532; 2 Reeves, Hist. Eng. Law, 20 (Ed. 1869); 2 Stubbs, Const. Hist. 192.

(m) Cawley, 239.

(n) See the form *ante*, p. 5, n. (h).

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for plaintiff.

capacity (*o*), so called because it is framed by the policy of man, and in this capacity the king is esteemed to be immortal, invisible, not subject to death, infirmity, infancy, nonage, &c. Now seeing the king has but one person and several capacities, and one politic capacity for the realm of England, and another for the realm of Scotland, to which capacity is allegiance due? And it was resolved that it was due to the natural person of the king, not to his politic capacity only, *i. e.* to his crown or kingdom distinct from his natural capacity, and that for divers reasons:—1st. Every subject is presumed by law to be sworn to the king, *i. e.* to his natural person, and likewise the king is sworn to his subjects, which oath he takes in his natural person. 2ndly. In all indictments of treason, when any do intend or compass *mortem et destructionem domini regis*, which must needs be understood of the king's natural body, for his politic body is immortal, not subject to death, the indictment concludes, *contra ligeantiæ suæ debitum (p)*; *ergo* allegiance is due to the natural body. 3rdly. The king holds the kingdom of England by birthright inherent, by descent from the blood royal, whereupon succession doth attend; and therefore it is usually said, "to the king, his heirs, and successors," wherein heirs is first named, and successors is attendant upon heirs. But the title is by descent. By Queen Elizabeth's death the crown and kingdom of England descended to his Majesty, and he was fully and absolutely thereby king, without any essential ceremony or act to be done *ex post facto*; for coronation is but a royal ornament and solemnization of the royal descent, but no part of the title.

In the first year of his Majesty's reign, before his Majesty's coronation, Watson, Clarke, and others were of

(*o*) See *Case of Fine*, 7 Rep. 32, a. 129, a.; *Earl of Leicester v. Heydon*,
(*p*) 3 Inst. 11; Hob. 271; Dyer, Plowd. Com. 384.
143, pl. 62; Cawley, 185; Co. Litt.

opinion, that his Majesty was no complete and absolute king before his coronation, but that coronation did add a confirmation and perfection to the descent; and therefore, that they might before his coronation forcibly take him and his royal issue into their possession, keep him prisoner in the Tower, remove such councillors and great officers as pleased them, and constitute others in their places, &c., and that these and other acts of like nature could not be treason against his Majesty before he was a crowned king (q). But it was resolved by all the judges of England, that presently by the descent his Majesty was completely and absolutely king, without any essential ceremony or act to be done *ex post facto*; and that coronation was but a royal ornament, and outward solemnization of the descent (r). And this appears by precedents: *ex. gr.*, Henry VI. was not crowned until the eighth year of his reign, and yet divers men before his coronation were attainted of treason, of felony, &c., and he was as absolute and complete a king, both for matters of judicature, as for grants, &c., before his coronation, as he was after. Whence it appears that by the laws of England there can be no *interregnum* within the same (s).

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for plaintiff.

In the reign of Edward II., the Spencers, father and son, to cover their treason invented this doctrine, that homage and the oath of allegiance were more by reason of the king's crown, *i. e.* of his politic capacity, than by reason of the person of the king, whence they inferred as follows:—1st. If the king do not demean himself by reason in the right of his crown his lieges are bound by

(q) See 6 Hume, Hist. Eng. 8.

(r) *Acc.* 3 Inst. 7, where we read that "if the crown descend to the rightful heir, he is *rex* before coronation, for by the law of England there is no *interregnum*, and coronation is but an ornament or solemnity of honour. And so it was resolved by all the judges, Hil. 1 Jac. 1, in the

case of Watson and Clarke, seminary priests; for by the law there is always a king in whose name the laws are to be maintained and executed, otherwise justice should fail." *Id.* 12.

(s) *Per* Lord Lyndhurst, C., *Visct. Canterbury v. Att.-Gen.* 1 Phill. 322; Leg. Max., 6th ed. 43. See stat. 1 Will. & M. c. 4.

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for plaintiff.

oath to remove the king. 2ndly. Seeing that the king could not be reformed by suit of law, that ought to be done by the sword. 3rdly. That his lieges be bound to govern in aid of him and in default of him. All which doctrines were condemned by two Parliaments (t).

The reasons why the king is accounted a body politic are three:—1st. *Causa majestatis*—the king cannot give or take but by matter of record for the dignity of his person. 2ndly. *Causa necessitatis*,—as to avoid the attainder of him who has right to the crown (u), lest in the interim there should be an *interregnum* which the law will not suffer (x). Also by force of this politic capacity, though the king be within age, yet may he make leases and other grants and the same shall bind him, otherwise his revenue might decay, and the king would not be able to reward services (y). 3rdly. *Causa utilitatis*,—as when lands and possessions descend (z) from his collateral ancestors, being subjects, as from the Earl of March to the king, the king becomes seised of the same *in jure corone*, in his politic capacity; for which cause they go with the crown; and therefore, albeit Queen Elizabeth was of the half-blood to Queen Mary, yet she in her body politic enjoyed all such fee-simple lands, as by the law she ought, and no collateral cousin of the whole blood to Queen Mary could have succeeded to the same.

(t) See *Proceedings against the Despenchers*, 1 St. Tr. 23, 38.

(u) Year Bk. 1 Hen. 7, pl. 5; Plowd. 238; Co. Litt. 16, a., where we read that “if the right heir of the crown be attainted of treason, yet shall the crown descend to him, and *eo instante* (without any other reversal) the attainder is utterly avoided.”

(x) *Ante*, p. 15, n. (r).

(y) Co. Litt. 43. a.; Plowd. 213, 221.

(z) If land be granted to the king without adding the words “and his

heirs,” a fee simple will vest in him, partly from prerogative royal, and partly because the king in judgment of law never dies. 2 Steph. Com. 484.

“This word, ‘king,’” in a statute “includes all his succession; for the king dies not in respect of his political capacity, and a gift to the king enures to his successors.” *The Case of Soldiers*, 6 Rep. 27, a.; 12 Rep. 110. Grant on Corporations, 627. And see 25 & 26 Vict. c. 37, and 36 & 37 Vict. c. 61, relating to the private estates of the sovereign.

The ligeance or faith of the subject is due to the king by the law of nature ; which is part of the law of England ; existed before any judicial or municipal law ; and is immutable.

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for plaintiff.

In virtue of
what law
allegiance
is due.

By this same law is the faith, allegiance, and obedience of the subject due to his sovereign or superior.

It appears indeed that the allegiance, faith, and obedience of the subject to the sovereign existed before municipal or judicial laws. For government and subjection were long before such laws, and it had been vain to have prescribed laws to any, but to such as owed obedience, faith, and allegiance before, in respect whereof they were bound to obey and observe them : *frustra enim feruntur leges nisi subditis et obedientibus*. Since then faith, obedience, and allegiance are due by the law of nature, it follows that the same cannot be changed or taken away ; for albeit municipal laws have imposed divers punishments and penalties, for breach or non-observance of the law of nature (for that law only consisted in commanding or prohibiting, without any certain punishment or penalty), yet the very law of nature itself never was nor could be altered or changed : *jura naturalia sunt immutabilia* (a).

If a man be attainted of felony or treason he thereby loses the king's legal protection, for he is disabled to sue any action real or personal (b), and yet such a person loses not that right of protection which by the law of nature is given to the king, for that is *indelebilis et immutabilis*, and therefore the king may protect and pardon him, and any man who kills him without warrant shall be punished by the law. So a man outlawed is out of the benefit of the municipal law, *utlegatus est quasi extra*

(a) Bract., lib. i. c. 5 ; Doct. et Stud., chaps. 2, 5 ; Carter, R. 130.

(b) 3 Inst. 126. As to the disability of an attainted person, see Broom's Pract. Sup. Courts, 298, 564 ; but by Stat. 33 & 34 Vict. c.

23, no judgment for any treason or felony causes any attainder or corruption of blood or any forfeiture or escheat, except in the case of forfeiture consequent upon outlawry (S. 1.).

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for plaintiff

legem positus,—caput gerit lupinum. Yet he is not out either of his natural allegiance or of the king's natural protection (c).

As to aliens.

II. In connection with the meaning of the word "alien" three points were discussed: Who is an alien born by the laws of England. How many kinds of aliens there are. What incidents belong to an alien.

Who is an
alien.

An alien is one born out of the allegiance of our king, and under the allegiance of another; he can have no real or personal action for or concerning land (d); but in every such action the tenant or defendant may plead, that he was born in such a country which is not within the allegiance of the king, and demand judgment if he shall be answered. *Alienigena est alieni gentis seu alienæ ligeantiae, qui etiam dicitur peregrinus, alienus, exoticus, extraneus. Extraneus est subditus qui extra terram, i. e. potestatem regis natus est* (e). And as to the plea of "alien born" two things are to be observed: 1st. That the most usual and best pleading in this case is both exclusive and inclusive, viz., *extra ligeantiam domini regis, &c., et infra ligeantiam alterius regis*, which cannot be pleaded in this case, because one king is sovereign of both kingdoms, and one allegiance is due by both kingdoms to one sovereign, and in case of an alien there must of necessity be several kings and several allegiances; 2ndly. No pleading was ever *extra regnum* or *extra legem* which are circumscribed to place, but *extra ligeantiam* which is not local or tied to any place.

How many
kinds of
aliens there
are.

Every man is either *alienigena*, an alien born, or *subditus*, a subject born. Every alien is either a friend or an enemy. Every alien enemy is either *pro tempore*, or *perpetuus*, or *specialiter permissus*. Every subject is either *natus*, born, or *datus*, given or made: and of these briefly

(c) Co. Litt. 128.

(c) Litt. s. 198; Co. Litt. 129; 4

(d) *Ante*, p. 4, n. (f), and *post*, Inst. 152.
p. 55.

in their order. An alien friend may by the common law have, acquire, and get within this realm, by gift, trade, or other lawful means, any treasure or goods personal whatsoever (*f*), as well as an Englishman, and may maintain an action for the same (*g*); but lands within this realm (*h*), or houses except for his necessary habitation an alien friend cannot acquire, nor can he maintain any action real or personal for any land or house, unless the house be for his necessary habitation. And if this alien friend become an enemy, then he is utterly disabled to maintain any action (*i*) or get anything within this realm.

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for plaintiff.

A perpetual enemy cannot maintain an action or acquire anything within this realm. All infidels are in law perpetual enemies, for the law presumes not that they will be converted, that being a remote possibility; between them and Christians there is perpetual hostility and can be no peace (*k*).

And upon this ground there is a diversity between the conquest of a kingdom of a Christian king, and the conquest of the kingdom of an infidel; for if a king come to a Christian kingdom by conquest, seeing that he hath

(*f*) Co. Litt. 2, b.

(*g*) Co. Litt. 129, b.; *Cocks v. Purday*, 5 C. B. 884; *Pisani v. Lawson*, 6 Bing. N. C. 90; *Wootton v. Steffenoni*, 12 M. & W. 129, and see now 33 Vict. c. 14, s. 2.

(*h*) *Ante*, p. 4, n. (*f*). *Post*, p. 55.

(*i*) Judgm., *The Hoop*, 1 Rob. Adm. R. 200, 201; *De Wahl v. Braune*, 1 H. & N. 178. The plea of "alien enemy," however, has never been favoured by the courts, which make every intendment against it: *Shepeler v. Durant*, 23 L. J. C. P. 140. See the form of plea of alien enemy, Bull. & L. Plead. 3rd ed. 475; *Sparenburgh v. Bannatyne*, 1 Bos. & P. 163; *Alcinous v. Ny-*

greu, 4 E. & B. 217, *post*, p. 55 n. (*o*).

A court of law will not direct the queen's subjects to hold communication with the queen's enemies—as by issuing a commission for the examination of witnesses in a hostile country. *Barrick v. Buba*, 16 C. B. 492.

(*k*) "This notion," says Willes, C. J., *Omichund v. Barker*, Willes, 542, "though advanced by so great a man"—as Lord Coke—"is, I think, contrary not only to the Scripture but to common sense and common humanity. It is a most impolitic notion, and would at once destroy all that trade and commerce from which this nation reaps such great benefits." See also *per* Sir W. Scott, *Le Louis*, 2 Dods. 244.

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for plaintiff.

vita et necis potestatem, he may at his pleasure alter and change the laws of that kingdom, but until he makes an alteration of those laws, the ancient laws of that kingdom remain (l). But if a Christian king should conquer the kingdom of an infidel, and bring it under his subjection, there *ipso facto* the laws of the infidel are abrogated (m). If a king has a kingdom by descent, he cannot change the laws of that kingdom, without consent of parliament. Also if a king obtains a kingdom by conquest, as Henry II. had Ireland, after John had given unto it, being under his obedience and subjection, the laws of England for the government of that country, no succeeding king can alter the same without parliament. Furthermore, in the case of conquest of a Christian kingdom, as well those that served in war at the conquest, as those that remained at home for the safety and peace of their country, and other the king's subjects, as well *antenati* as *postnati*, are capable of inheriting lands in the kingdom conquered and may maintain any action for the same, and have the like privileges and benefits there as they may have in England.

The third kind of enemy is *inimicus permissus*, an enemy who comes into the realm by the king's safe conduct.

Incidents to
the status of
a subject
born.

There are regularly three incidents to a subject born.

1st. That the parents be under the actual obedience of the king; for though the King of England may have absolute right to other kingdoms or dominions, yet if he be not in actual possession thereof none born there since

(l) "The laws of England are not superinduced upon any country by conquest; but the old laws remain until the king by his proclamation or letters patent declare other laws; and then, if he will, he may declare laws which be utterly repugnant, and

differing from the laws of England." *Per* Bacon, *arg.*, 2 St. Tr. 591. *Vide post*, p. 49.

(m) The distinction here insisted on has justly been exploded. See *per* Lord Mansfield, C. J., *Campbell v. Hall*, 20 St. Tr. 294, 323, 325.

the crown of England was out of actual possession thereof are subjects to the King of England.

2ndly. That the place of birth be within the king's dominion—but here a distinction must be noticed; for although allegiance or obedience, *ultra* the king's dominions, may make a subject born; yet residence within the king's dominions without obedience can never produce a natural subject. Thus, if any of the king's ambassadors in foreign nations have children there of their wives, being English women, by the common law of England they are natural-born subjects, and yet they are born out of the king's dominions. But if enemies should come into the king's dominions, and surprise a castle or fort and possess the same by hostility, and have issue there, that issue is no subject to the king, though born within his dominions; because he was not born under the king's allegiance or obedience.

3rdly. The time of birth is of the essence of a subject born; for he cannot be a subject of the king of England unless at the time of his birth he was under the allegiance and obedience of the king. And that is the reason why *antenati* in Scotland are aliens born, in respect of the time of their birth.

III. The argument *ab inconvenienti* has been urged against the plaintiff on four grounds:—

1st. That if *postnati* were inheritable they ought in reason to be bound by our laws, but *postnati* are not bound by our statute or common law, for they having never so much freehold or inheritance cannot be returned of juries, nor subject to scot or lot, nor chargeable to subsidies, nor bound by any Act of Parliament made in England.

In answer to this objection it was resolved, that if a *postnatus* purchase any land in England, he shall be subject in respect thereof, not only to the laws of this realm, but also to all services and contributions, and to the payment of subsidies, taxes, and public charges, in like

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Arguments
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The argu-
ment *ab in-
convenienti*.

1st Objec-
tion.

Answer
thereto.

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as incon-
venient and
answers.

manner as any denizen or Englishman (*n*); nay, if he dwell in England, the king may command him, by a writ of *ne exeat regno*, that he depart not out of England. But if a *postnatus* dwell in Scotland, and have land in England, he will be chargeable for the same to all intents and purposes as if an Englishman were owner thereof, and dwelt in Scotland, Ireland, in the Isle of Man, Guernsey, or Jersey, or elsewhere. And so of an Irishman who dwells in Ireland, having land in England. But if *postnati*, or Irishmen, inhabitants of the Isle of Man, of Guernsey, Jersey, &c., have lands within England, who dwell here, they will be subject to all services and public charges within this realm, as any Englishman. So as to service and charges, the *postnati* and Englishmen born are all in one predicament.

2nd Objection.

2ndly. Whether one be born within the kingdom of Scotland or no is not triable in England because it is a thing done out of this realm, and no jury can be returned for the trial of any such issue.

To which objection a twofold answer was given.

Answer
thereto.

(1) That a like objection might be made against Irishmen, men of the Isle of Man, of Guernsey, Jersey, or Berwick, all of whom appear by our books to be natural-born subjects; and yet no jury can come out of any of those countries and places, for trial of their births there. (2) If the demandant or plaintiff in any action concerning land be born in Ireland, Guernsey, Jersey, &c., out of the realm of England, if the tenant or defendant plead,

(*n*) See the opinions of the judges in the case of the *postnati*, 2 St. Tr. 576, who, in reference to the sovereign, observe, that "his kingly power extending to divers nations and kingdoms, all owe him equal subjection, and are equally born to the benefit of his protection. And although he is to govern them by their distinct laws, yet any one of

the people coming into the other is to have the benefit of the laws where-soever he cometh, and is to bear the burdens and taxes of the place where he cometh; but living in one, or for his livelihood in one, he is not to be taxed in the other, because laws ordain taxes, impositions, and charges, as a discipline of subjection particularized to every particular nation."

that he was born out of the allegiance of the king, &c., the demandant or plaintiff may reply that he was born under the allegiance of the king at such place within England (o); and upon the evidence the place will not be material, but the issue will be, whether the demandant or plaintiff were born under the allegiance of the king in any of his kingdoms or dominions whatsoever: and in that case the jury, if they will, may find the special matter, namely, the place where he was born, and leave it to the judgment of the court. But in the case at bar, seeing the defendant has pleaded the truth of the case, and the plaintiff has not denied it, but demurred, and thereby confessed all matters of fact, the court now ought to judge upon the special matter, as if a jury upon an issue joined in England had found the special matter, and left it to the court.

CALVIN'S
CASE.

Arguments
ab incon-
venienti and
answers.

3rdly. It was objected that this innovation was so dangerous that the consequence thereof no man could foresee.

3rd Objec-
tion.

To the third objection it was answered that this judgment was rather a renovation of former judgments than an innovation; neither have judges power to judge according to that which they think to be fit, but they must adjudge that which out of the laws they know to be right and consonant to law. *Judex bonus nihil ex arbitrio suo faciat, nec proposito domesticæ voluntatis, sed juxta leges et jura pronuntiet.* And fears grounded upon no just cause, *qui non cadunt in constantem virum, vani timores æstimandi sunt.*

Answer
thereto.

4thly. It was objected that if *postnati* were by law legitimated in England, inconvenience and confusion would follow, should the king's royal issue fail, whereby the kingdoms of England and Scotland might again be divided.

4th Objec-
tion.

As to which it was answered that natural legitimation respects actual obedience to the sovereign at the time of

Answer
thereto.

CALVIN'S
CASE.
—
Arguments
ad incon-
venienti and
answers.

the birth; for as the *antenati* remain aliens as to the crown of England, because they were born when there were several kings of the several kingdoms, and the uniting of the kingdoms by descent subsequent, cannot make him a subject to that crown to which he was alien at the time of his birth; so albeit the kingdoms should by descent be divided, and governed by several kings; yet all those who were born under one natural obedience, while the realms were united under one sovereign, would remain natural-born subjects, because naturalization due and vested by birthright cannot by any separation of the crowns afterward be taken away; nor he, that was by judgment of law a natural subject at the time of his birth, become an alien by such a matter *ex post facto*. And in the case supposed, our *postnatus* may be *ad fidem utriusque regis* (p).

But on the other hand some inconveniences would follow, if the plea against the plaintiff were allowed. For it tends to make allegiance local; *ligeantia regis regni sui Scotiæ*, and *ligeantia regis regni sui Angliæ*: whence it would follow (1) that faith or allegiance, which is universal, would be confined within certain limits and bounds; and (2) subjects would not be bound to serve the king in peace or in war out of those limits; (3) it would illegitimate many, and some of noble blood, who were born in France, and divers other of his Majesty's dominions, whilst the same were in actual obedience, and in Berwick, Ireland, Guernsey, and Jersey, if this plea were admitted for good. And lastly, this strange and new-devised plea tends too much to countenance that dangerous and desperate error of the Spencers, touched before, to receive any allowance within Westminster-hall.

The Judg-
ment.

Whereupon all and singular the premises being seen, and by the court of the lord the now king here diligently

inspected and examined, and mature deliberation being had thereof; for that it appears to the court of the lord the now king here, that the aforesaid plea of the said Richard Smith and Nicholas Smith, above pleaded, is not sufficient in law to bar the said Robert Calvin from having an answer to his aforesaid writ: therefore it is considered by the court of the lord the now king here, that the aforesaid Richard Smith and Nicholas Smith to the writ of the said Robert do further answer.

CALVIN'S
CASE.

Having above set forth in an abridged form the arguments and resolutions in *Calvin's Case*—a case which Lord Bacon (*q*) describes as “of exceeding great consequence,” affecting not only the island of Great Britain, but generations then unborn—let us now proceed to discuss the leading propositions deducible from that case and from subsequent decisions, which indicate the nature of allegiance,—by whom and to whom it is due. Within the limits thus assigned we will endeavour strictly to confine ourselves, neither digressing into an inquiry respecting domicil (*r*) nor suffering purely technical topics to arrest attention, but rather keeping in view the matter to which this section of the Volume has been devoted, *viz.*, the obligations imposed on the subject and the duties owing by him to the Crown.

NOTE TO
CALVIN'S
CASE.

The tie binding the subject to the Crown is called “allegiance,” and is defined by Lord Coke (*s*) to be “a true and faithful obedience of the subject due to his sovereign;” “ligeance,” he says, being derived *à ligando*

Allegiance—
what.

(*q*) Arg., 2 St. Tr. 575.

(*r*) “The question of naturalization and allegiance is distinct from that of domicil.” *Per* Ld. West-

bury, *Low v. Routledge*, L. R. 1 Sc. App. 452.

(*s*) Co. Litt. 129, a.; Arg., 2 St. Tr. 567.

NOTE TO
CALVIN'S
CASE.

as "the highest and greatest obligation of duty and obedience that can be." "Allegiance," says Dr. Cowell (t), "at first properly implied the due and legal subjection of every vassal to his lord. It is now restrained to the natural and sworn allegiance, or legal obedience which every subject owes to his prince." "It is," remarks Sir W. Blackstone (u), "the tie or *ligamen* which binds the subjects to the king in return for that protection which the king affords the subject." *Protectio trahit subjectionem et subiectio protectionem* (v). Allegiance and protection are reciprocally due from the subject and the sovereign, though it by no means follows that if protection by the sovereign be refused, the allegiance of the subject therefore ceases or is discharged.

Allegiance
—by whom
due.

Allegiance is due by every natural-born subject to the Crown; as soon as born within the realm the subject owes at common law, in right of birth, allegiance and obedience to his sovereign (x). By the older writers, and in some of the older statutes (y), a natural-born subject is designated a natural liegeman; for the subject is bound to obey and serve the king—his liege lord, and the king is bound to maintain and defend the subject (z).

(t) Law Dict. *ad verb.*; *ante*, p. 8.

(u) 1 Com. 366.

(v) *Ante*, p. 8; Judgm., 3 Knapp, P. C. C. 369.

(x) Co. Litt. 129, a.; *Macdonald's Case*, 18 St. Tr. 857; *Craw v. Ramsey*, Vaugh. 279. A declaration of the right to be deemed a natural-born subject may in certain cases be obtained by stat. 21 & 22 Vict. c. 93, ss. 2, 9, and see 33 Vict. c. 14, s. 7, as to persons with respect to whose nationality as British subjects

a doubt exists.

(y) *Ante*, p. 9, n. (s).

(z) A person is said to be a natural subject because his subjection begins with his birth, and a king is said to be a man's natural prince, because his protection begins as soon as the subject can be protected, and in the same sense that a country where a man is born is his natural country, or the language he first speaks is his natural tongue. *Craw v. Ramsey*, Vaughan, 279.

Allegiance, as we deduce from *Calvin's Case* (a), is due from the subject, wherever he may be, to the sovereign; it is not in any case local: it could not at common law be cast off or put aside; nor could it be neutralised, much less obliterated or extinguished by the existence of any similar tie concurrently binding towards another sovereign. *Nemo patriam in quâ natus est exuere aut ligeantiae debitum ejurare potest* (b). No man can rid himself of his nationality—*Jus originis nemo mutare potest* (c), nor abjure the allegiance due from him. Such were the maxims of the common law. Nor was it in the power of any foreign prince by naturalization, or employing a subject of Great Britain, to dissolve the bond of allegiance between that subject and the Crown (d). Whence it followed that a subject of this realm entering into the service of a foreign power at war with this country, and being taken in the field, whether in or out of this realm, was not treated as a prisoner of war according to his commission, or like a native subject of the hostile power, but as a criminal and a traitor, and one liable to the pains of treason (e).

NOTE TO
CALVIN'S
CASE.
—
Allegiance—
indelible at
common
law.

The principles above mentioned, however, so far as they relate to the perpetual and indelible character of allegiance, must now be taken with some qualification, to which we shall presently refer (f); but it is none the less true that since the sovereign's power to protect the sub-

(a) *Ante*, p. 12.

(b) *Leg. Max.* 6th ed. p. 71. "The well-known maxim," observes Sir. M. Foster, "which the writers upon our law have adopted and applied to this case, *nemo potest exuere patriam*, comprehendeth the whole doctrine of natural allegiance. *Fost. Disc. High Treas.* 184.

(c) *Arg., Duke of Hamilton's Case*, 4 St. Tr. 1163.

(d) *R. v. Macdonald*, 18 St. Tr. 859; *Dr. Story's Case*, 1 *Id.* 1087.

(e) *Macdonald's Case*, 18 St. Tr. 857; *Reg. v. Vaughan*, 13 St. Tr. 485.

(f) *Post*, p. 37.

NOTE TO
CALVIN'S
CASE.

ject extends beyond the geographical limits of his realm, so the duty of allegiance, whilst it exists, cannot be confined within the boundaries thereof.

Allegiance
—to whom
due.

In *Calvin's Case* it was resolved (g) that allegiance is due to the natural person of the king, and not to his politic capacity only, *i.e.*, to his crown or kingdom as distinct from his natural capacity, a doctrine from which important consequences flow:—

To a king
de facto;

Allegiance is due to a king *de facto* (h). “It must,” says Sir Michael Foster (i), “be paid to that prince who for the time being is in the actual and full possession of the regal dignity.” This may be fitly illustrated as follows:—The Statute of Treasons (k) declares it *inter alia* to be treason “when a man doth compass or imagine the death of our lord the king,” or “if a man do levy war against our lord the king in his realm, or be adherent to the king’s enemies in his realm, giving to them aid and comfort in the realm or elsewhere.” An indictment framed upon this statute has always charged that the accused being a subject of the king, not regarding the duty of his allegiance, did commit the treason alleged against him. And this statute of Edw. III., as well as the ordinary form of indictment for treason, is applicable where the treason was committed against a king *de facto*, being in plenary possession of the crown, for in this case, the throne being full, any person out of possession claiming title to it is no king, be his pretensions what they may. “These principles,” says Sir M. Foster (l),

(g) *Ante*, p. 13.

(h) See stat. 11 Hen. 7, c. 1; Bowy. Const. Law Eng. 403; 1 Hale, P. C. 60.

(i) Disc. High Treas. 184.

(k) 25 Edw. 3, st. 5, c. 2.

(l) Disc. High Treas. 188; *Id.* 402, 403; where *Sir Harry Vane's Case*, 6 St. Tr. 119, is commented on.

“no lawyer hath ever yet denied. They are founded in reason, equity, and good policy.”

NOTE TO
CALVIN'S
CASE.

Another consequence flows from this doctrine—that allegiance is due to the person of the king. It becomes due to him immediately on the demise of his predecessor.

—to the
king on his
accession ;

“A prince succeeding to the crown by descent or by a previous designation of parliament, is from the moment his title accrueth a king to all intents and purposes within the Statute of Treasons antecedently to his own coronation, or to any oaths or engagements taken to him on the part of the subject, for as on the one hand the solemnity of a coronation doth not confer but presupposeth a right to the allegiance of the subject inherent in the person of the king, so on the other the duty of allegiance doth not flow from any oaths or engagements taken on the part of the subject. For in both cases an antecedent duty is presupposed, which is intended to be secured by those explicit engagements” (*m*).

Since, moreover, allegiance is due to the natural person of the sovereign, it remains due to him and follows him everywhere. Therefore it is said (*n*) that if the king be expelled by force and another usurps the throne, yet the duty of allegiance is not thus taken away (*o*). “And if the king go out of England with a company of his servants, allegiance remaineth amongst his subjects and servants, although he be out of his own realm, whereto his laws are confined,” *ex. gr.*, King Edw. I. went in person into France, to a marriage; one of his servants in France stole two silver dishes, for which he was apprehended by the French: the king required to have him

—wherever
he may be.

(*m*) Foster, Disc. High Treas. 188, 189.

(*n*) Arg., 2 St. Tr. 570, 596.

(*o*) See Fost. Cr. Law, Disc. 4.

NOTE TO
CALVIN'S
CASE.

redelivered, being his subject and of his train; and upon dispute in the parliament of Paris, he was sent to the King of England to do his own justice upon him, whereupon he was tried before the steward and marshal of the king's house, and executed in France (*p*). Which proves that "the king's law follows his allegiance out of the local limit of the laws of England."

Allegiance
is indi-
visible.

Inasmuch as the natural person of the king cannot be divided, the allegiance owing to him is inseparable and indivisible (*q*), it is not owing severally in respect of one or other of his dominions (*r*). In a trial for high treason (*s*) charged to have been committed just prior to the union of Scotland with this kingdom—the doctrine thus deduced from *Calvin's Case* was on behalf of the accused strongly and ingeniously controverted. Can it be pretended, it was there asked, that the obedience due from the subject to the sovereign is an absolute blind obedience? Is it not rather such an obedience as the law of the particular kingdom has prescribed? If then this obedience is governed by the law of the place where it is due, it follows that where laws differ, the rule of obedience and subjection must also differ, and consequently the allegiance due to the king as King of England, and the allegiance due to him as King of Scotland, must, in respect of the difference of the laws of these nations (*t*), be separate and distinguishable: "were it not so the same act, if so in one, must in both kingdoms be the performance of the subject's allegiance—and the same act,

(*p*) Fleta, lib. ii. c. 3, cited Vaugh. 282, in 2 St. Tr. 570, 596, 597, and per Lord Langdale, M. R., *Duke of Brunswick v. King of Hanover*, 6 Beav. 42.

(*q*) Per Lord Ellesmere, 2 St. Tr.

691.

(*r*) *Ante*, p. 24, and see Westlake, Priv. Int. Law, Sec. 25. (2nd ed.)

(*s*) *Reg. v. Lindsay*, 14 St. Tr. 987, 1005, 1009.

(*t*) *Post*, p. 41.

if so in either, must in both kingdoms be the breach of it." Hence it was argued in *Lindsay's Case*, that there must be two allegiances—one owing to the king as King of Scotland, the other owing to him as King of England—that a subject of the king in one regal capacity is not his subject in the other—that a subject of the king as King of Scotland is not a subject of the king as King of England. Reasoning such as this, if just and logical, might have led to consequences productive of perplexity or even of danger to the commonwealth. A fallacy, however, is discoverable in it—allegiance is due from any one within the protection of the Crown, wherever, in what part soever of the dominions of the Crown he may chance to be—and that allegiance includes the obligation of obeying the laws which in such locality prevail. And hence it seems rightly argued in *Rex v. Johnson (u)*, that "There is great difference between the allegiance due to the king, and the obedience due to the laws of any part of his dominions, of which the other parts of his dominions are independent." "Allegiance to the King of the United British Empire is as much due from a Scotchman as from an Englishman, but no obedience is due from a Scotchman resident in his native land to the laws of England."

NOTE TO
CALVIN'S
CASE.

Every one born within the dominions of the King of England, whether here or in his colonies or dependencies (*x*), being under the protection of—therefore, according to our common law, owes allegiance to—the king, and is subject to all the duties and entitled to enjoy all the rights and liberties of an Englishman. Yet, whilst

(u) 29 St. Tr. 406.

(x) *Craw v. Ramsey*, Vaugh. 279 ;
Dyer, 224, a., pl. 29.

As to the nationality of one born
at sea, *post*, p. 39,

Allegiance—
from whom
due.

NOTE TO
CALVIN'S
CASE.

the subject may so act as to forfeit his claim to be protected, he cannot, so long as he claims to remain a subject—and he could not at common law by any means in his power—relieve himself from the duties and obligations arising out of the tie of allegiance (*y*).

Tie of alle-
giance—how
severable.

The tie of allegiance being thus strict at common law, let us now consider how it might be severed, and to what extent the severity of the law in this particular has been modified by statute.

This, at common law, could be done by the united action of the sovereign and the legislature, by means of a statute applicable to the particular case or class of cases (*z*); but the sovereign alone, although he might conditionally dispense with the obligation of his subjects, as by the grant of licence to individuals to enter the service of a foreign prince, could not absolutely free them therefrom (*a*), and the subject himself was equally powerless.

—by abdi-
cation and
resettlement
of the
crown;

At common law a transfer of allegiance might also be effected, as would seem, by abdication of the sovereign, and a resettlement by parliament of the crown and order of succession to it; of which method, the proceeding which resulted in the Bill of Rights (*b*) offers a just and notorious precedent (*c*). By that bill, which is in part declaratory and in part enacting, “the lords spiritual and temporal and commons assembled at Westminster, lawfully,

(*y*) In *Sir Walter Raleigh's Case* (2 St. Tr. 1, 34), it was held that employment in the service of the crown under a special commission, after attainder for treason, was no dispensation for former offences; for the king might use the services of any subject, though the subject's right of demanding protection were forfeited by his attainder; *Raveley's Case*, Cro. Jac. 495.

(*z*) It is said, however, that there is no instance of such a statute. See Sir A. Cockburn's treatise on Nationality, p. 64.

(*a*) F. Plowden's *Investigation of the Native Rights of British Subjects*.

(*b*) 1 Will. & M., sess. 2, c. 2.

(*c*) Compare 2 Steph. Com. 437; Allen on Prerog. 86.

fully, and freely representing all the estates of the people of this realm," did declare that King James II. had abdicated the government and that the throne was consequently vacant, and did resolve that "William and Mary, Prince and Princess of Orange, be and be declared King and Queen of England, France, and Ireland, and the dominions thereunto belonging, to hold the crown and royal dignity of the said kingdoms and dominions to them the said prince and princess during their lives and the life of the survivor of them," and the assembled lords and commons did further prescribe the form of the oath of allegiance which should thenceforth be taken. Thus the allegiance of the subject before due to King James II. became transferred to the new dynasty. To this historic precedent much more forcibly than to that offered in the deposition of the 2nd Edward (*d*) or the 2nd Richard (*e*) may the remark of Sir Michael Foster (*f*) be applied, that the power assumed by parliament of deposing the reigning sovereign and resettling the succession to the crown is derived from "the right of self-defence in cases of great and urgent necessity, and where no other remedy is at hand—a right which the law of nature giveth and no law of society hath taken away" (*g*).

NOTE TO
CALVIN'S
CASE.

A transfer of allegiance might, it seems, be effected by a complete disruption or dismemberment of the empire consequent upon civil war. The late Mr. Justice Story, in a case below cited (*h*), after noticing the principle of

—by dis-
member-
ment of
empire ;

(*d*) *Proceedings against King Edward 2*, 1 St. Tr. 47.

(*e*) *Articles of Accusation against Richard 2*, 1 St. Tr. 135.

(*f*) Disc. 4, p. 382.

(*g*) Compare the remarks of Sir M. Foster on *Sir Harry Vane's*

Case, and his inquiry whether Charles 2 was king *de facto* from the death of his father. Disc. 4, p. 402.

(*h*) *Inglis v. Trustees of the Sailors' Snug Harbour*, 3 Peters (U. S.), R. 156, 157.

NOTE TO
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CASE.

common law above referred to (i), and observing that upon the abdication of the government by one prince it passes by operation of law to him whom the nation appoints as his successor, proceeds to remark, that a case of greater nicety and intricacy presents itself where a country is divided by a civil war, and each party establishes a separate and independent form of government. There, if the old government is completely overthrown and dissolved in ruin, the allegiance by birth would seem by operation of law to be dissolved, and the subjects left to attach themselves to such party as they may choose, and thus to become the voluntary subjects, not by birth, but by adoption, of either of the new governments. But where the old government, notwithstanding the division, remains in operation, it was considered, regard being had to the doctrine of the common law, that by adhering to the new government, persons might acquire the rights, and incur the corresponding obligations of subjects to such government; yet without being thereby absolved from allegiance to the old government. A person might owe allegiance to both governments—he might be *ad fidem utriusque regis*.

—cession,
treaty.

Having regard to the doctrine of indebility of allegiance, it was considered that the cession of a colony by the Crown did not, at common law, *ipso facto* convert into aliens those who were before natural-born subjects, but that reference must be had to the terms of the compact entered into between the sovereign of the parent state and the colonists separating themselves therefrom (k), and only if it should appear from such compact that the Crown and Legislature of the former intended

(i) *Ante*, p. 27.

(k) *Sutton v. Sutton*, 1 Russ. & My. 663.

to renounce all authority over or claim to govern the latter, would they be released or absolved from their allegiance; but that, if the words of the compact would not admit of such construction, a double allegiance would be due from all natural-born subjects in the seceding colony.

NOTE TO
CALVIN'S
CASE.

The principles just adverted to were discussed in the case of *Doe d. Thomas v. Acklam* (l), in which it was decided that children born in the United States of America after the recognition of their independence of parents born there before such recognition, but continuing to reside there afterwards, were aliens, incapable of inheriting land in this country. Prior to this decision, it had been held in the American courts that natives of Great Britain were aliens, and incapable of inheriting land in the United States (m). The doctrine established in our courts accordingly was, that the American *antenati*, by remaining in America after the treaty of peace, lost their character of British subjects; whilst in the courts of the United States it was considered that by withdrawing from that country and adhering to the British government, they lost, or perhaps, more properly speaking, never acquired, the character of American citizens (n).

The Court, in *Doe v. Acklam*, rejected the idea of a double allegiance being due from the natural-born subjects of seceding states, continuing to dwell there, in deference to the express language of treaties and statutes; it however intimated that the argument *ab inconvenienti* (o), founded upon the consequences of

(l) 2 B. & C. 779. Compare *Doe v. Mulcaster*, 5 B. & C. 771.

(n) 3 Peters (U. S.), R. 122; *Re Bruce*, 2 C. & J. 450; *Doe d. Stansbury v. Arkwright*, 5 C. & P. 575.

(m) *Blight's Lessee v. Rochester*, 7 Wheaton (U. S.), R. 535.

(o) *Ante*, p. 21.

NOTE TO
CALVIN'S
CASE.

Allegiance of subject who becomes a sovereign prince—how modified.

applying such a doctrine, would have had great weight if the language of the treaties had been doubtful. Such inconveniences are exemplified by the case of the Duke of Hamilton, tried for treason, A.D. 1649 (*p*).

Should a subject by birth of this Crown acquire by accession or election the sovereignty of an independent state, the allegiance due from him to his natural liege lord may become modified, or may possibly be *ipso facto* discharged. In a case (*q*) where aid from the Court of Chancery was sought against a defendant so circumstanced, Lord Langdale, M.R., thus expressed himself:—"I cannot venture to say that a subject acquiring the character of a sovereign prince in another country, and being recognised as a sovereign prince by the sovereign of the country of his origin, may not by the act of recognition, in ordinary circumstances, and by the laws of some countries, be altogether released from the allegiance and legal subjection which he previously owed." Yet such person may, on his accession to a foreign crown, unite in his own person the character and exercise concurrently the rights and privileges of a sovereign prince and English subject. "As a subject," remarked the learned judge, "he owes duties correlative to which not individuals only but the country at large may have legal rights which are to be respected, and being legal rights against a subject in respect of his acts and duties as a subject, it seems that they ought, if necessary and practicable, to be vindicated and enforced by the law" (*r*).

(*p*) 4 St. Tr. 1155—1173.

(*q*) *Duke of Brunswick v. King of Hanover*, 6 Beav. 1; S. C., 2 H. L. Cas. 1, and cases there collected.

(*r*) *Per* Lord Langdale, M. R. 6

Beav. 54-56; *per* Lord Brougham, 2 H. L. Cas. 24; *per* Lord Campbell, *Id.* 25; and see *Wadsworth v. Queen of Spain*, 17 Q. B. 171.

Such were the only means by which at common law the allegiance of the subject could be released or discharged by operation of law. Every one was, as a rule, free to leave this country and to establish himself for purposes of trade or residence elsewhere. He might become a subject of the foreign state (s), and clearly signify his intention of never returning to England, yet in the eye of the law he remained an Englishman, and, as such, subject to all obligations imposed on him by his nativity (t).

NOTE TO
CALVIN'S
CASE.

But this ancient strictness has given way to legislative provisions more in accordance with the spirit of modern times (u), and by the Naturalization Act of 1870 (x) it has been provided that any British subject who, when in any foreign state and not under any disability, shall have voluntarily *become naturalized* in such state, shall thenceforth be deemed to have ceased to be a British subject and be regarded as an alien (y). Any person, however, who, before the passing of the Act, had voluntarily become naturalized in a foreign state, was permitted within two years after the passing of the Act, (12th May, 1870), to make a declaration of his desire to remain a British subject, and a person who has made such declaration is to be deemed to be a British subject except within the limits of the state in which he has been naturalized (z). The Act also provides that any person,

(s) *Marryat v. Wilson*, 8. T. R. 31; S. C. in error, 1 B. & P. 430; *Jephson v. Riera*, 3 Knapp. P. C. C. 130.

(t) An English subject resident in a neutral state is at liberty to trade with the enemy of this country in all articles except those which are contraband. See *per* Sir W. Scott, *The*

Ann, 1 Dods, 223. *The Carlotta*, *Id.* 387. See also *Esposito v. Bowden*, 7 Ellis & B. 763.

(u) See Rep. of the Royal Commission on the Laws of Naturalization and Allegiance, 1869.

(x) 33 Vict. c. 14.

(y) Sec. 6.

(z) Sec. 6, subs. 1.

Voluntary
expatria-
tion.

NOTE TO
CALVIN'S
CASE.

who by reason of having been born within the dominions of Her Majesty is a natural-born subject, but who also at the time of birth became under the law of any foreign state a subject of that state, and any person born out of Her Majesty's dominions of a father being a British subject, may, by making a declaration of alienage in the manner provided by the Act, cease to be a British subject (*a*).

Tests for
determining
who is a
natural-
born sub-
ject at
common
law.

In solving the question, who is at common law a natural-born subject, these tests as suggested in *Calvin's Case*, (*b*) are to be applied:—1st. His parents must, at the time of birth, have been under the actual obedience of the king; 2ndly. The place of birth must have been within the king's dominions (*c*); and 3rdly. The time of birth must be considered; for if born under the allegiance of this Crown he could not—in contemplation of law—be the subject of another (*d*). In *Doe d. Durore v. Jones* (*e*), Lord Kenyon, C.J., observes, "The character of a natural-born subject, anterior to any of the statutes, was incidental to birth only; whatever were the situations of his parents the being born within the allegiance of the king constituted a natural-born subject." The exceptions to this rule are indeed so special as to prove it true (*f*)—for they include

(*a*) Sec. 4.

(*b*) *Ante*, p. 20.

(*c*) Molloy, Bk. 3, chap. 2. s. 1.

"If the king of England enters in a hostile manner the territories of another prince or state, and any be born within any of the places or guards possessed by the king's army, they are looked upon in law to be within his protection, and such person born is a natural-born subject of England, but then he must be of parents subjects not hostile." *Craw*

v. Ramsey, Vaugh. 281; Molloy, bk. 3, chap. 3, s. 4.

As to the validity of a marriage performed within the lines of the army when serving abroad, see *The Waldegrave Peerage Case*, 2 Cl. & Fin. 649.

(*d*) *Craw v. Ramsey*, Vaugh. 268.

(*e*) 4 T. R. 308.

(*f*) "Every exception that can be accounted for is so much a confirmation of the rule that it has become a maxim: '*Exceptio probat regulam*.'" "

merely the children of the king himself, who wheresoever born are, by the common law here inheritable (*g*); and the issue of an ambassador in a foreign country, which issue by his wife being an Englishwoman are also by the common law natural-born subjects (*h*).

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CASE.

A British ship, public or private, on the high seas is for most purposes deemed to be British territory, (*i*) and a person born on board such ship, being within the protection of our law, will owe obedience to it and to our sovereign (*k*). It has been judicially observed (*l*) that "although an English ship in some respects carries with her the laws of her country in the territorial waters of a foreign state, yet, in other respects, she is subject to the laws of that state as to acts done to the subjects thereof." But "it is clear that an English ship on the high seas out of any foreign territory, is subject to the laws of England; and persons, whether foreign or English, on board such ship are as much amenable to English law as they would be on English soil" (*m*).

Persons
born at sea.

Per Lord Kenyon, C. J., 3 T. R. 722; *Id.* 38.

(*g*) 25 Edw. 3, st. 2, declaring "that the law of the crown of England is and always hath been such that the children of the kings of England, in whatsoever parts they be born in England or elsewhere, be able and ought to bear the inheritance after the death of their ancestors—which law our said lord the king, the said prelates, earls, barons, and other great men, and all the commons assembled in this parliament do approve and affirm for ever."

(*h*) *Ante*, p. 21; and see *De Geer v. Stone*, 22 Ch. D. 243; 52 L. J., Ch. 57.

(*i*) *Reg. v. Lopez*, Dears. & B. 525; *Reg. v. Sattler*, *Id.* 539; *per Holroyd, J.*, *Forbes v. Cochrane*, 2 B. & C. 464; *per* Best, J., *Id.* 467. See *per* Story, J., 3 Peters (U. S.), R. 155; Arg., *Reg. v. Serva*, 1 Den. C. C. 125; *Reg. v. Anderson*, L. R. 1 C. C. R. 161; 38 L. J., M. C. 12; *Reg. v. Keyn*, 2 Ex. D. 63; 46 L. J., M. C. 17.

(*k*) *Marshall v. Murgatroyd*, L. R. 8 Q. B. 31; 40 L. J., M. C. 7.

(*l*) *Reg. v. Lesley*, Bell, C. C. 220, 233, 234; 29 L. J., M. C. 97; and see *Reg. v. Carr*, 10 Q. B. D. 76; 52 L. J., M. C. 12.

(*m*) By 41 & 42 Vict. c. 73 an offence committed by a person,

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CASE.

PERSONS
born in
Wales.

In the Union Acts having reference respectively to Wales (*n*), to Scotland (*o*), and to Ireland (*p*), are contained provisions which here deserve attention. Of the first-mentioned of these statutes sect. 1 enacts that the "country and dominion of Wales shall be, stand and continue for ever from henceforth incorporated, united, and annexed to and with" the realm of England, and that all persons born, and to be born, in the said country of Wales "shall have, enjoy, and inherit, all and singular freedoms, liberties, rights, privileges, and laws" within this realm and "other the king's dominions as other the king's subjects naturally-born within the same have, enjoy, and inherit"—the effect of which words is to naturalize persons born in Wales (*q*). Sect. 2 enacts that the laws of England, statutory or otherwise, shall be used in Wales.

Scotland.

The Act of Union of England with Scotland provides (*r*) that besides freedom of trade between the two countries, there "be a communication of all other rights, privileges, and advantages which do or may belong to the subjects of either kingdom, except where it is otherwise expressly agreed in these articles;" and further (*s*) that "all laws and statutes in either kingdom, so far as they are contrary to, or inconsistent with, the terms of these articles or any of them, shall from and after the union cease and become void"—whence we may infer, as remarked by

whether a subject of Her Majesty or not, on the open sea within one marine league of the coast of Her Majesty's dominions, is an offence within the jurisdiction of the Admiralty, although it may have been committed on board or by means of a foreign ship. See Stephen. Hist.

Crim. Law, vol. ii. 30-42.

(*n*) 27 Hen. 8, c. 26.

(*o*) 5 Ann. c. 8.

(*p*) 39 & 40 Geo. 3, c. 67.

(*q*) See *Godfrey and Dixon's Case* Palm. 13, 15.

(*r*) Art. 4.

(*s*) Art. 25, affirmed by s. 6.

Blackstone (*t*), that the municipal laws of Scotland are to be still observed, unless altered by Parliament (*u*), and that “the municipal or common laws of England are, generally speaking, of no force or validity in Scotland.”

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CASE.

The Act of Union of England with Ireland, by art. 8, Ireland, provides that all laws in force at the time of the union shall remain operative, subject to alterations by the parliament of the United Kingdom (*x*), and that laws contrary to the articles be repealed.

As regards the colonial and other dependencies of the Crown, it must suffice here to say that every such dependency, whether acquired by occupancy, by conquest, or by cession, is subject to the paramount legislative authority of the British parliament (*y*), albeit the laws prevailing in such dependency will vary according to the mode of its acquisition by the mother country, as will presently be briefly noticed (*z*). The Colonies.

Further, as regards our colonies :—By the Naturalization Act, 1870, which repeals a former statute upon the subject (*a*), it is enacted (*b*) that “all laws, statutes and ordinances which may be duly made by the legislature of any British possession for imparting to any person the privileges or any of the privileges of naturalization to be enjoyed by such person within the limits of such possession, shall within such limits have the authority of law, but shall be subject to be confirmed or disallowed

(*t*) 1 Com. 93.

(*u*) See *R. v. Kinloch*, 18 St. Tr. 395.

(*x*) See *R. v. Johnson*, 29 St. Tr. 81.

(*y*) Clark, Colon. Law, 10 ; 1 Bla. Com. 107 *et seq.* ; See *per* Bramwell, B., *Santos v. Illidge*, 8 C. B., N. S.

869 ; *per* Blackburn, J. Charge to the grand jury in the case of *Reg. v. Eyre*, 1868, Rep. by Finlason, p. 65 ; and *Phillips v. Eyre*, L. R. 6 Q. B. 1 S.c. 40 L. J., Q. B. 23.

(*z*) *Post*, p. 48 *et seq.*

(*a*) 10 & 11 Vict. c. 83.

(*b*) 33 Vict. c. 14. s. 16.

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CASE.

by her Majesty in the same manner and subject to the same rules in and subject to which her Majesty has power to confirm or disallow any other laws, statutes, or ordinances in that possession." Where any question arises as to the national *status* of a person domiciled in a colony, such question must be determined by the law of England, whilst the rights and liabilities incident to that *status* must be determined by the law of the colony (c).

Naturaliza-
tion.

Private Acts of Naturalization have from the first year of Queen Elizabeth downwards been passed (d); whilst by a series of public statutes the privileges of natural-born subjects have been extended to various classes of persons born beyond the limits of the dominions of the crown. Thus by the 25 Edw. 3, st. 2 (e), it was enacted that

(c) *Donegani v. Donegani*, 3 Knapp, P. C. C. 63; *Re Adam*, 1 Moo. P. C. C. 460. It was decided in the great case of *Craw v. Ramsey*, Vaugh. 274, that an alien naturalized in Ireland by an act of the Irish parliament would not thereby be naturalized in England. See also *Udny v. Udny*, L. R. 1 Sc. App. 457; *Low v. Routledge*, 1 Ch. App. 42; 35 L. J., Ch. 114.

(d) Hansard on Aliens, 14, and *ib. n.* (p).

(e) Lord Bacon, arguing in *Calvin's Case*, 2 St. Tr. 585, says, "I will put you a case that no man shall deny, where the law of England doth work and confer the benefit of naturalization upon a birth neither within the dominions of the kingdom nor king of England. By the statute of 25 Edw. 3, which, if you will believe Hussey, is but a declaration of the common law, all children born in any

parts of the world, if they be of English parents continuing at that time as liege subjects to the king, and having done no act to forfeit the benefit of their allegiance, are *ipso facto* naturalized. Nay, if a man look narrowly into the law in this point, he shall find a consequence that may seem at the first strange, but yet cannot be well avoided; which is, that if divers families of English men and women plant themselves at Middleborough, or at Roan, or at Lisbon, and have issue, and their descendants do intermarry amongst themselves, without any intermixture of foreign blood; such descendants are naturalized to all generations; for every generation is still of liege parents, and therefore naturalized: so as you may have whole tribes and lineages of English in foreign countries.

"And therefore it is utterly untrue

"all children inheritors which from henceforth shall be born without the ligeance of the king, whose fathers and mothers at the time of their birth be and shall be at the faith and ligeance of the King of England, shall have and enjoy the same benefits and advantages to have and bear the inheritance within the same ligeance" as certain persons specified in a preceding portion of the Act, "so always that the mothers of such children do pass the sea by the licence and wills of their husbands;" and Lord Kenyon, in *Doe v. Jones* (*f*), expresses strongly his opinion that by this enactment the legislature meant to confer on the children of natural-born parents born abroad, not merely the right of inheritance, but all the rights and privileges of natural-born subjects. Thus substantially stood the law *de natis ultra mare* until the time of Queen Anne, in whose reign were passed two statutes (*g*) (the later of which repealed the former, save as to the 3rd sect.) which gave explicitly to the statute of Edward III. the full effect conceded to its words by Lord Kenyon, for by the clause of the 7th Queen Anne thus remaining unrepealed it was enacted, that "the children of all natural-born subjects born out of the ligeance of her Majesty (*h*), her heirs and successors, shall be deemed adjudged, and taken to be natural-born subjects of this

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CASE.

Statute *de
natis ultra
mare*.

that the law of England cannot operate or confer naturalization, but only within the bounds of the dominions of England." But there appears to be no foundation for the contention here advanced by Lord Bacon. See *per* Kay, J., *De Geer v. Stone*, 22 Ch. D. 243; 52 L. J., Ch. 57, and authorities there cited and discussed.

(*f*) 4 T. R. 308, cited *ante*, p. 38.

(*g*) 7 Ann. c. 5; 10 Ann. c. 5.

(*h*) An illegitimate child born abroad cannot claim the country of its parents. *Reg. v. Blane*, 13 Q. B. 769; 18 L. J., M. C. 216; arg., *Kent v. Burgess*, 11 Sim. 368. *Secus*, if born within the dominions of the Crown, 2 Dyer, 224, a. pl. 29; Vaugh. 282; or on a British ship on the high seas, *Marshall v. Murgatroyd*, L. R. 6 Q. B. 31; 40 L. J., M. C. 7.

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kingdom, to all intents, constructions, and purposes whatsoever."

The most cursory inspection however of these words might suffice to show an ambiguity lurking in them. Must the parents of one entitled to the benefit of this Act have been *both* natural-born subjects, or will the Act apply when *one* of the parents only is a natural-born subject? Upon this ambiguity light was thrown by the stat. 4 Geo. 2, c. 21 (*i*), which expounded the prior enactment, affixing to it this meaning, that all children born out of the ligeance of the Crown of England "whose *fathers* were or shall be natural-born subjects of the Crown" at the time of the birth of such children, shall be adjudged and taken to be themselves natural-born subjects to all intents and purposes whatsoever. The stat. 13 Geo. 3, c. 21 (*k*) confers the like privileges on grandchildren in the paternal line of one within the words of the prior enactment. And the stat. 11 & 12 Will. 3, c. 6 (explained by 25 Geo. 2, c. 39) enacted that any person being the king's natural-born subject might inherit and be inheritable to land although the ancestor through whom the title might be traced or derived was born out of the king's allegiance.

In addition to the above list of statutes concerning

(*i*) Sec. 2 of this statute excepts from its operation the children of parents attainted of treason or in the actual service of foreign princes at enmity with the Crown; and sec. 3 qualifies the exceptions contained in the preceding section.

In *Doe v. Mulcaster* (8 D. & R. 53; S. C. 5 B. & C. 771), it was held that children born in the United States of America since the recognition of their independence of parents

who resided there before, but who were natural-born British subjects and at the time of the separation of the two countries adhered to the British Government, were not aliens, but within the operation of the stat. 4 Geo. 2, c. 21.

(*k*) Sec. 1. See *Fitch v. Weber*, 6 Hare, 51; *Drummond's Case*, 2 Knapp, P. C. C. 295; *De Geer v. Stone*, 22 Ch. D. 243; 52 L. J., Ch. 57.

aliens by birth, reference must be made to the 7 & 8 Vict. c. 66, which enacted that persons born out of her Majesty's dominions of a *mother* being a natural-born subject of the United Kingdom should be capable of taking any estate, real or personal, by devise, purchase, or inheritance. It also introduced a new method of obtaining naturalization—namely, by the certificate of a Secretary of State.

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CASE.

But the last-mentioned Act is now repealed by the Naturalization Act, 1870 (*l*), which, together with the Naturalization Act, 1872 (*m*), now provides a simple and inexpensive method whereby aliens desirous of settling in the United Kingdom can obtain the advantages of naturalization without the necessity of a private Act of Parliament. It enacts (*n*) that an alien who has resided in the United Kingdom, or has been in the service of the Crown, for not less than five years, and who intends, when naturalized, either to reside in the United Kingdom or to serve under the Crown, may apply for a certificate of naturalization to one of the principal Secretaries of State; who is empowered, if he think fit, after receiving evidence in support of the application, to grant a certificate accordingly (*o*). Upon the grant of such certificate the alien, on taking the oath of allegiance (*p*), becomes, in the United Kingdom, entitled to all political and other rights and privileges, and subject to all the obligations to which a natural-born British subject is entitled or subject in the United Kingdom, but is not when within the

Naturaliza-
tion Act,
1870.

Certificate
of natural-
ization.

(*l*) 33 Vict. c. 14.

(*m*) 35 & 36 Vict. c. 39.

(*n*) Sec. 7.

(*o*) A statutory alien (*ante*, p. 37) may obtain a certificate of readmission to British nationality, subject to

the same conditions upon which an alien may obtain a certificate of nationality. Sec. 8.

(*p*) Sec. 9. See also 33 & 34 Vict. c. 102.

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CASE.

limits of the state of which he was a subject previously to obtaining his certificate, to be deemed a British subject unless he has ceased to be a subject of that state (*q*).

An alien naturalized under the provisions of the Act of 1870, is therefore, to adopt the language of Lord Coke, "to all intents and purposes, as a natural-born subject," with this exception only, that the Act, not being retrospective, will not operate, any more than would naturalization at common law, to confirm a title to land which accrued to such alien prior to its date (*r*).

An important question affecting the position of naturalized aliens in England arose in the case of *Mette v. Mette* (*s*), viz., whether the statute 5 & 6 Will. IV. c. 54 (*t*), enacting that all marriages "between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever," applied to the case of a marriage celebrated in a foreign country between M., a naturalized alien here domiciled, and the half-sister of his deceased wife, a native of Frankfort, according to the law of which place such a marriage would be valid. In deciding this question affirmatively, Cresswell, J., after remarking that M., by residing and acquiring a domicile here, had made this his country by election as far as in him lay, said, "at the time of the second marriage, he, as a natural liege subject, owed obedience to the statute, and in the absence of any authority or dictum showing that a person

(*q*) Sec. 7. As to the national status of married women and children, see 33 Vict. c. 14, s. 10.

(*r*) *Fish v. Klein*, 2 Mer. 431; *Sharp v. St. Sauveur*, L. R. 7 Ch. 343; 41 L. J. Ch. 576.

(*s*) 1 Swab. & Trist. 416; 28 L. J.

(C. P. M. & A.) 97.

(*t*) As to the operation of this stat., see *Fenton v. Livingstone*, 3 Macq. Sc. App. Ca. 497; *Reg. v. Brighton*, 30 L. J. M. C. 197; *Brook v. Brook*, 9 H. L. Cas. 274; *Howarth v. Mills*, L. R. 2 Eq. 389.

naturalized and domiciled is not in this respect to be treated as a natural-born subject, I feel bound to hold that M. was bound by the statute 5 & 6 Will. IV. c. 54, and that the marriage solemnized between him and the half-sister of his former wife was void" (u).

Distinguishable from natural allegiance, *i.e.*, allegiance due from a natural-born subject, or from a naturalized alien, are two kinds: allegiance may be imposed by denization (x), or may be due in virtue of residence in this country or its dependencies (y).

Denization or donation is acquired by an alien-born Denization. who has obtained *ex donatione regis* the status of an English subject (z). Denization may be absolute or limited, or granted upon condition (a). It may be conferred by letters patent from the Crown (b), or by conquest, whilst the privileges incidental to naturalization can, as already intimated, only be conferred by Act of Parliament, or certificate under the Act of 1870 (c).

(u) 1 Swab. & Trist. 427.

(x) "The people of England now do and always did consist of native persons, naturalized persons, and denized persons." *Craw v. Ramsey*, Vaugh. 291.

(y) "Every alien coming into a British colony becomes temporarily a subject of the crown"—*per* Turner, L. J., *Low v. Routledge*, L. R., 1 Ch. App. 47.

(z) 2 Steph. Com. 411.

(a) *Ante*, p. 9.

(b) "The king only without the subject may make not only letters of safe conduct but letters patent of denization to whom and how many he will, and enable them at his leisure to sue any of his subjects in any action whatsoever, real or personal,

which the king could not do without the subject if the subject had any interest given unto him by the law concerning an alien-born." But the king cannot grant to any other to make of strangers born denizens; it is by the law itself so inseparably and individually annexed to his royal person. For the law esteemeth it a point of high prerogative—*jus majestatis et inter insignia summe potestatis*—to make aliens born subjects of the realm, and capable of the lands and inheritances of England in such sort as any natural-born subject is. 7 Rep. 25, b. See *East India Company v. Sandys*, 10 St. Tr. 499, 535.

(c) 33 Vict. c. 14, *ante*, p. 45.

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Lord Coke (*d*) commenting upon the 198th section of Littleton—and defining the words “alien” and “denizen”—observes that denization by letters patent differs much from naturalization; for if a denizen had issue in England before he became such, that issue cannot inherit to his father; whereas, if his father were naturalized by parliament, the issue *antenatus* could inherit.

By the Naturalization Act, 1870, it is specially provided (*e*) that nothing therein contained shall affect the grant of letters of denization by her Majesty.

Denization
by conquest.

Then, as to denization by conquest (*f*),—in *The Mayor of Lyons v. The East India Company* (*g*), Lord Brougham observes:—All the authorities lay it down that upon a conquest the inhabitants, *antenati* as well as *postnati*, of the conquered country become denizens of the conquering country, and to maintain that the conquered people became aliens to their new sovereign upon his accession to the dominion over them, would be absurd and inconsistent with common sense, as much so as in the time of James I. it would have been to hold that the English inhabitants of the realm were aliens. So, in the great case of *Campbell v. Hall* (*h*), Lord Mansfield, C.J., lays down, *inter alia*, these propositions;—1st. That a country conquered by the British arms becomes a dominion of the king in right of his crown (*i*), and therefore

(*d*) Co. Litt. 129, a.

(*e*) 33 Vict. c. 14, sec. 13.

(*f*) Sir W. Blackstone (1 Com. 10, 13) speaks of “the right of conquest” as “a right allowed by the law of nations, if not by that of nature, but which in reason and civil policy can mean nothing more than that, in order to put an end to hostilities, a compact is either expressly or tacitly

made between the conqueror and the conquered, that if they will acknowledge the victor for their master he will treat them for the future as subjects and not as enemies.”

(*g*) 1 Moo. P. C. C. 175, 287.

(*h*) 20 St. Tr. 322, 323.

(*i*) “No point is more clearly settled in the courts of common law than that a conquered country forms

necessarily subject to the legislative power of the parliament of Great Britain. 2ndly. That the conquered inhabitants, once received into the conqueror's protection, become subjects, and are universally to be considered in that light—not as enemies or aliens. 3rdly. That the laws of a conquered country continue until they are altered by the conqueror (*l*). This last proposition may, indeed, need in some sort to be qualified.

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Referring to the rule thus worded, that "the laws of a conquered country remain until altered by the new authority," Lord Stowell observed, in *Ruding v. Smith* (*l*), that the word "remain" has, *ex vi termini*, a reference to the obligation of such laws upon those in whose usage they already existed, and not to those who are entire strangers to them. "Even with respect to the ancient inhabitants," said Lord Stowell, "no small portion of the ancient law is unavoidably superseded by the revolution of government that has taken place. The allegiance of the subjects, and all the law that relates to it—the administration of the law in the sovereign and appellate jurisdictions—and all the laws connected with the exercise of the sovereign authority—must undergo alterations adapted to the change." "The laws which prevailed in the conquered territory may be harsh and oppressive in the extreme—may contain institutions abhorrent to the feelings and opinions and habits of the conquerors, and can be but

How far the
laws of a
conquered
country con-
tinue.

immediately part of the king's dominions." *Per* Sir W. Scott, *The Foltina*, 1 Dod. 451.

(*k*) *Ante*, p. 20. Memorandum, 2 P. Wms. 75; *per* Lord Ellenborough, C. J., 30 St. Tr. 945; *Jephson v. Riera*, 3 Knapp, P. C. C. 130, 152; *per* Gould, J., *Fabrigas v. Mostyn*, 20 St. Tr. 162. The law of a con-

quered country may be altered by the Crown, by proclamation or letters patent under the great seal, not solely by means of an order in council. *Jephson v. Riera*, *supra*, recognised, *Judgm.*, *Cameron v. Kyte*, 3 Knapp, P. C. C. 346.

(*l*) 2 Hagg. Consist. R. 382.

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imperfectly understood ; and that they should all of them instantaneously attach and continue obligatory upon them is a proposition which I think a professor of general law would be inclined to consider cautiously, before it could be universally admitted " (n).

If it be true (n), as laid down in *Dr. Bonham's Case* (o), that "the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void," *ex. gr.*, if they be "against common right and reason, or repugnant or impossible to be performed;" if, further, it be true that international comity cannot be suffered to prevail where its observance would tend to an infraction of the laws of God or nature (p); it would be strange indeed if some limitation were not to be imposed in applying the ordinary rule, that the laws of a conquered country will continue until altered by the conqueror (q).

What laws
may be im-
posed by the
Crown.

Supposing, however, that the King of England is minded in right of conquest to change the laws of a conquered country, and conceding that he may do so in virtue of his prerogative and without the concurrence of parliament, this power of extra-parliamentary legislation is thus limited:—That no laws can be imposed on the conquered country by the Crown, which are contrary to or conflict with fundamental principles (r); for instance, he cannot grant laws exempting from the authority of parliament

(m) *Judgm.*, 2 Hagg. Consist. R. 381, 382.

(n) *Quære tamen*. See *per* Willes, J., *Lee v. Bude Railway Co.*, L. R. 6 C. P. 582.

(o) 8 Rep. 118, a.; *acc. Cromwell's Case*, 4 Rep. 13, a., *et vide per* Sir W. Scott, *The Fox*, Edw. Adm. R. 313.

(p) *Leg. Max.*, 6th ed. 15.

(q) See the argument of Mr. Nolan

in *R. v. Picton*, 30 St. Tr. 741, 900; *per* Lord Ellenborough, C. J., *Id.* 742, 865; Arg., *Donegani v. Donegani*, 3 Knapp, P. C. C. 69; Memorandum, 2 P. Wms. 75; *Blankard v. Galdy*, Salk. 411, 412.

(r) *Per* Lord Mansfield, C. J., 20 St. Tr. 323; Arg., *R. v. Picton*, 30 St. Tr. 751, 900, 934, 938.

or conferring privileges in exclusion of his other subjects. The reason of this limitation being that the authority of the king as conqueror, and in virtue of his prerogative, is subordinate to his own authority as a part of the supreme legislature, the legislative power of the Crown over a conquered country is limited by the constitution, and is subordinate to parliament. If, moreover, the king by royal proclamation or otherwise, delegates to a legislative assembly (s) erected in the conquered country the subordinate power vested in him, he will thus deprive himself of the right of afterwards exercising it, and will preclude himself from levying taxes—as he might otherwise have done—upon the inhabitants of the conquered country. Such was the precise point raised and decided in *Campbell v. Hall* (t), where by a mere inversion of the order in which a certain proclamation and certain letters patent were issued on behalf of the Crown by its servants, the imposition of an export duty on goods shipped as produce from the island of Grenada was adjudged to have been illegal and void.

Not only by conquest but likewise by occupation or settlement, and by cession, may sovereign title to a territory be acquired, and allegiance become owing to this Crown.

“All corporeal property,” says Sir W. Scott (u), Title by occupation

(s) As to the validity of laws enacted by such legislatures, see 28 & 29 Vict. c. 63.

(t) 20 St. Tr. 239 ; S. C., 1 Cowp. 204 ; Judgm., *Jephson v. Riera*, 3 Knapp, P. C. C. 152 ; per Sir William Grant, M. R., 2 Mer. 158 ; *Re Island of Cape Breton*, 5 Moo. P. C. C. 259 ; *Re States of Jersey*, 9 Id. 185 ; *Re Lord Bishop of Natal*,

3 Moore, P. C. N. S. 148 ; and see per Blackburn, J., Charge to the Grand Jury, in *Reg. v. Eyre*, p. 63 (Rep. by Finlason) ; and *Phillips v. Eyre*, L. R. 4 Q. B. 225 ; S. C. in error, 6 Do. 1 ; 40 L. J. Q. B. 28.

(u) Judgm., *The Fama*, 5 Rob. 114–116 ; cited, Judg., *Cremidi v. Powell*, 11 Moo. P. C. C. 97.

NOTE TO
CALVIN'S
CASE.
—
or settle
ment.

“depends very much upon occupancy. With respect to the origin of property this is the sole foundation, *quod nullius est ratione naturali occupanti conceditur*” (x). To consummate the right of property, a person must unite the right of the thing with possession, must have the *jus in rem* and the *jus in re*. And in newly discovered countries where a title is meant to be established for the first time some act of possession is usually done and proclaimed to notify the fact.

Again, if a new and uninhabited country be found out by subjects of the Crown of England, as the law is the birthright of every subject, so wherever they go they carry their laws with them, and therefore such new-found country is to be governed by the laws of England (y); the law applicable in the case now supposed differing from that which applies in the case of conquest, inasmuch as “the conqueror, by saving the lives of the people conquered, gains a right and property in such people, in consequence of which he may impose upon them what laws he pleases” (z).

Title by
cession.

In transfer by cession also, where the former rights of others are to be superseded and extinguished, such transfer ordinarily is and ought to be indicated by public acts, so that all interested in the event as inhabitants of the ceded territory may thereby be informed under whose dominion and under what laws they are to live (a). And

(x) Leg. Max. 6th ed. 335.

(y) Memorandum, 2 P. Williams, 75; *Blankard v. Galdy*, Salk. 411; *Dutton v. Howell*, Show, P. C. 31, 32; per Lord Brougham, *Mayor of Lyons v. East India Company*, 1 Moore, P. C. C. 272; per Holroyd, J., *Forbes v. Cochrane*, 2 B. & C.

463.

(z) 2 P. Williams, 75.

(a) Judgm., 5 Rob. 115. As to the effect of cession on the laws and rights of property prevailing in the ceded territory, see per Marshall, C. J., *United States v. Percheman*, 7 Peters (U. S.), R. 86, 87; Judgm.,

solemn instruments of cession are usually drawn up by which the rights and duties of residents in the ceded territory are defined. For instance, the treaty between the mother country and the American colonies, A.D. 1783, constituting the latter an independent state, made persons who were then adhering to the American government free of their allegiance to this Crown, and left them to adopt their allegiance to the new *régime*. But if after that time persons continued owing allegiance to the Crown of these kingdoms, the treaty did not entitle such persons to put an end to their allegiance at any future period (*b*).

NOTE TO
CALVIN'S
CASE.

An important consideration, however, as regards the introduction of our municipal laws into a territory acquired by this Crown, whether in right of conquest, of cession, or of settlement, may be of this kind—Did the law in question originate out of a purely local policy? Was it adapted solely to the mother country in which it was made? Guided by such considerations, Sir William Grant, M.R., held in *The Attorney-General v. Stewart* (*c*) that the statute of Mortmain did not extend to the island of Grenada, and in *The Mayor of Lyons v. The East India Company* (*d*), it was held that the English law incapacitating aliens from holding real property to their own use, and transmitting it by descent or devise had not been introduced into the East Indies (*e*).

Mitchell v. United States, 9 *Id.* 734 ;
Judgm., *Stoher v. Lucas*, 12 *Id.*
436, 438 ; *Canal Appraisers v. The*
People, 17 Wendell (U. S.), R. 584 *et*
seq. ; *In re Adam*, 1 Moo. P. C. C.
470.

(*b*) *Per Bayley, J., Doe v. Mul-*
caster, 8 D. & R. 604, 605 ; S. C. 5 B.
& C. 775 ; *In re Bruce*, 2 Cr. & J.
450, 451.

(*c*) 2 Mer. 143.

(*d*) 1 Moo. P. C. C. 175.

(*e*) See also *Freeman v. Fairlie*, 1
Moore Ind. App. 305 ; *Lauteur v.*
Teesdale, 8 Taunt. 836 ; *Att-Gen. of*
Bengal v. Ranee Surnomoye Dossee,
9 Moore, Ind. App. 387 ; *Whicker*
v. Hume, 7 H. L. C. 124 ; *Yeap v.*
Ong, L. R. 6 P. C. 381, *et ib. cit.*

NOTE TO
CALVIN'S
CASE.Alien *ami*.

Let us now briefly inquire respecting the legal position of an alien, casually resident in this country, who has acquired no special privileges by nationalization or denization. "An alien," says Sir M. Foster (*f*), "whose sovereign is in amity with the Crown of England, residing here and receiving the protection of the law, owes a local allegiance to the Crown during the time of his residence. And if during that time he commits an offence, which, in the case of a natural-born subject would amount to treason, he may be dealt with as a traitor." For his person and estate are as much under the protection of the law as those of a natural-born subject, and if he is injured in either he has the same remedy at law for such injury. So long therefore as he remains under the protection of the laws of the state must he pay obedience to those laws, but no longer (*g*).

Alien
enemy.

"An alien whose sovereign is at enmity (*h*) with us, living here under the king's protection, committing offences amounting to treason, may likewise be dealt with as a traitor, for he owes a temporary local allegiance founded on that share of protection he receives. And if such alien, seeking the protection of the Crown, having a family and effects here, should, during a war with his native country, go thither and there adhere to the king's enemies for purposes of hostility, he might be dealt with as a traitor. For he came and settled here

(*f*) Disc. High Treason, 185. An ambassador owes allegiance to that sovereign only by whom he is accredited; the nature and extent of the inviolability attaching to him are learnedly discussed in Sir R. J. Phillimore's Commentaries upon International Law, vol. ii. pp. 156, et

seq. (3rd ed.).

(*g*) Arg., *Reg. v. Johnson*, 49 St. Tr. 395; *Wolff v. Oxholm*, 6 M. & S. 92.

(*h*) As to an alien enemy, see *Sorensen v. Reg.*, 11 Moo. P. C. C. 141; *Albrecht v. Sussmann*, 2 Ves. & B. 323. *Reg. v. Depardo*, 1 Taunt.

under the protection of the Crown, and, though his person was removed for a time, his effects and family continued still under the same protection."

NOTE TO
CALVIN'S
CASE.

As appears from Calvin's case, aliens were by our common law placed under grave disabilities with regard to the rights of property (*i*), which however have by recent legislation been almost entirely removed. By

Disabilities
of aliens
removed.

stat. 7 & 8 Vict. c. 66 (*k*), above referred to (*l*), such persons being the subjects of a friendly state, in addition to personal property of every description, except chattels real, were empowered to take and hold lands, houses, and other tenements for the purpose of residence, occupation, or trade for any term not exceeding twenty-one years. And the Naturalization Act, 1870, now provides (*m*) generally that real and personal property of every description may be taken, acquired, held, and disposed of by an alien (*n*) in the same manner in all respects as by a natural-born British subject, and a title to such property may be acquired through (*o*), from, or in succession to an alien in the same manner in all respects as through, from, or in succession to a natural-born British subject. It is however specially provided that an alien shall not thereby be qualified for any office, or for any parliamentary, municipal, or other franchise (*p*), or to be the owner of a British ship (*q*).

26; *Maria v. Hall*, *id.* 33; S. C., 2 Bos. & P. 236.

(*i*) *Ante*, p. 4.

(*k*) Sec. 4.

(*l*) *Ante*, p. 43.

(*m*) 33 Vict. c. 14, s. 2.

(*n*) These words include a disposition by will; "but in determining what is the valid will of an alien the general principles of law laid down

by the Privy Council and House of Lords must still be applied." *Per* Sir J. Hannen, *Bloxam v. Favre*, 8 Pr. D. 107; S. C. 9 Pr. D. 130, C. A.

(*o*) *Quære*, whether a plea of alien enemy can be pleaded to an action of contract since the passing of the above stat. See Chitty Cont. 11th ed. p. 182.

(*p*) Sec. 2, subs. 1.

(*q*) Sec. 14.

NOTE TO
CALVIN'S
CASE.

Conclusion.

From the subject, then, according to his status or condition is owing to the Crown allegiance, which may either be due by birth, or acquired by naturalization or denization, or, in the case of aliens, local and temporary; and this is due irrespective of any oath of allegiance which at common law may be exacted, or by statute may be imposed. Lord Coke, commenting on the Statute of Marlebridge (*r*), says that albeit divers persons be exempted from personal attendance at the tourn or leet for taking the oath of allegiance, “yet are all subjects of what quality, profession, or sex soever, as firmly bounden to their allegiance as if they had taken the oath, because it is written by the finger of the law in every one of their hearts, and the taking of the corporal oath is but an outward declaration of the same.” The statutory profession of allegiance now in force has already been appealed to as indicating the nature of the debt due from the subject to the Crown. If to the substance of such profession we add that a subject, whether natural-born or alien, is bound to know the law and keep it—to conform to the requirements of justice, flowing from the Crown as its ideal source—and if to this we further add, that a subject being tenant of land in fee simple, looks to the sovereign as his feudal superior and lord paramount (*s*), we have conveyed to us some—though perhaps but an imperfect—idea of the obligations of the subject to the Crown.

(*r*) 2 Inst. 121.

(*s*) Argument of Mr St. John,

Hampden's Case, 3 St. Tr. 864 *et seq.*; 2 Steph. Com. 401.

PART I.

SECTION II.

DUTIES OF THE SOVEREIGN TOWARDS THE SUBJECT.

THE king, having by law an hereditary crown, “the law and constitution have also ascertained his duties—those duties which it is incumbent upon him to execute for the benefit of the subject—in the execution of which duties they have aided him with counsel, and in consideration of which duties they have clothed him with dignity, and vested him with high prerogatives” (t).

The duties of the king are set forth in his coronation oath, but they attach upon him the instant he becomes such—at the instant when the corresponding duty of allegiance is first owing to him by the subject. The kingly duties recognised in the coronation oath are, amongst others, these (u)—to “govern the people of this Kingdom of England, and the dominions thereto belonging, according to the statutes in parliament agreed on, and the laws and customs of the same,” and to “cause law and justice in mercy to be executed in all his judgments.” This oath, observes Sir M. Foster (x), is a solemn and a public recognition, not only of the duties of the king, but of the fundamental rights of the people—imposing this most sacred obligation—to govern according to the laws and statutes in parliament agreed upon, according to the laws and customs of the same and no other.

(t) *Per* Sir J. Scott, A.G., *R. v. Hardy*, 24 St. Tr. 244

(u) See 1 Will. & M., sess. 1, c. 6.

(x) *Disc. High Treas.* 8, 9.

To Magna Charta, made in the 9th Hen. III., and confirmed in the 25th Edw. I., as well as by many later statutes (*y*), to the Petition of Right (*z*), to the Habeas Corpus Acts of Car. II. (*a*), and Geo. III. (*b*), to the Bill of Rights (*c*), and to the Act of Settlement (*d*), we must now look for a statutory exposition of the privileges of the people of this country, and of the corresponding duties of the Crown.

An inspection of the coronation oath as above in part set forth, and of the leading features of our great statutes, suggests a threefold division of the matter to which this section is to be devoted. We will consider, 1st, the right of the subject to personal liberty, which the institution of trial by jury and the writ of *habeas corpus* mainly guarantee: 2ndly, his right of property; and 3rdly, the solemn obligation imposed on the sovereign neither to add to nor to dispense with existing laws. *Rex ad tutelam legis, corporum, et bonorum subditorum erectus est* (*e*).

§ 1. RIGHT OF PERSONAL LIBERTY.

The right of personal liberty is in the following pages illustrated by three cases, respectively establishing these propositions:—1st. That slavery is not tolerated in Great Britain. 2ndly. That the freedom of juries is inviolate. 3rdly. That any illegal restraint of liberty may summarily be redressed.

(*y*) Up to the second year of Hen. 6 inclusive are to be found thirty-seven statutes which in general or specific terms affirm the great charter.

(*z*) 3 Car. 1, c. 1.

(*a*) 31 Car. 2, c. 1.

(*b*) 56 Geo. 3, c. 100.

(*c*) 1 Will. & M., st. 2, c. 2.

(*d*) 12 & 13 Will. 3, c. 2.

(*e*) Fortescue, de Laud. Leg. Ang. c. 13.

SOMMERSETT'S CASE, 20 St. Tr. 1 (f).

(12 Geo. 3, A.D. 1771-2.)

RIGHT OF PERSONAL LIBERTY.

A person forcibly detained in England as a slave is entitled to be discharged on habeas corpus.

On the 3rd of December, A.D. 1771, affidavits were made that James Sommersett, a negro, was confined in irons on board a ship called the "Ann and Mary," John Knowles commander, lying in the Thames, and bound for Jamaica; and Lord Mansfield, C.J., on an application supported by these affidavits, allowed a writ of *habeas corpus*, directed to Knowles, and requiring him to return the body of Sommersett before his lordship with the cause of detainer (g).

Knowles on the 9th of December produced the body of Sommersett before Lord Mansfield, and returned for cause of detainer, that Sommersett was the negro slave of one Mr. Steuart, who had delivered Sommersett into Knowles's custody, in order to carry him to Jamaica, and there sell him as a slave. Affidavits were also made by Mr. Steuart and two other gentlemen, to prove that Steuart had purchased Sommersett as a slave in Virginia, and had afterwards brought him into England, where he left his master's service; and that his refusing to return was the cause of his being carried on board Knowles's ship.

Lord Mansfield, referring the matter to the determination of the Court of King's Bench, Sommersett was bound in a recognizance with sureties for his appearance there on the second day of the next Hilary Term; and his lordship

(f) Reported as *Somerset v. Stewart*, Lofft, 1.

(g) The Queen's Bench Division of the High Court of Justice, as guardian of the personal liberty of the subject, will, on motion supported by sufficient affidavits, grant a rule to show cause why a writ of *habeas*

corpus should not issue to the parties apparently in custody of the person on whose behalf the application is made, commanding them to produce the body of that person according to the tenor of the writ. *The Case of the Hottentot Venus*, 13 East, 195 *Darnell's Case*, *post*.

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SETT'S CASE.

allowed till that day for settling the form of the return to the *habeas corpus*. Accordingly on that day, Sommersett appeared in the Court of King's Bench, and the following return was read :—

Return to
the *habeas*
corpus.

I, John Knowles, commander of the vessel called the “Ann and Mary,” in the writ hereunto annexed, do most humbly certify and return to our present most serene sovereign the king; that at the time hereinafter mentioned of bringing the said James Sommersett from Africa, and long before, there were, and from thence hitherto there have been, and still are great numbers of negro slaves in Africa; and that during all the time aforesaid there hath been and still is a trade, carried on by his Majesty's subjects, from Africa to his Majesty's colonies or plantations of Virginia and Jamaica in America, and other colonies and plantations belonging to his Majesty in America, for the necessary supplying of the aforesaid colonies and plantations with negro slaves; and that negro slaves, brought in the course of the said trade from Africa to Virginia and Jamaica aforesaid, and the said other colonies and plantations in America, by the laws of Virginia and Jamaica aforesaid and the said other colonies and plantations in America, during all the time aforesaid, have been, and are saleable and sold as goods and chattels, and upon the sale thereof have become and been, and are the slaves and property of the purchasers thereof, and have been, and are saleable and sold by the proprietors thereof as goods and chattels. And I do further certify and return to our said lord the king, that James Sommersett, in the said writ hereunto annexed named, is a negro, and a native of Africa; and that the said James Sommersett, long before the coming of the said writ to me, to wit, on —, was a negro slave in Africa aforesaid, and afterwards, to wit, on the same day and year last aforesaid, being such negro slave, was brought in the course of the said trade as a negro slave from Africa aforesaid to Virginia aforesaid, to be there sold; and afterwards, to wit, on —, the said James Sommersett, being

and continuing such negro slave, was sold in Virginia aforesaid to one Charles Steuart, who then was an inhabitant of Virginia aforesaid; and that the said James Sommersett thereupon then and there became, and was the negro slave and property of the said Charles Steuart, and hath not at any time since been manumitted, enfranchised, set free, or discharged; and that the same James Sommersett, so being the negro slave and property of him the said Charles Steuart, and the said Charles Steuart having occasion to transact certain affairs and business of him the said Charles Steuart in this kingdom, he the said Charles Steuart, before the coming of the said writ to me, to wit, on —, departed from America aforesaid, on a voyage for this kingdom, for the purpose of transacting his aforesaid affairs and business, and with an intention to return to America, as soon as the said affairs and business of him the said Charles Steuart in this kingdom should be transacted; and afterwards, to wit, on —, arrived in this kingdom, to wit, in London, that is to say, in the parish of St. Mary-le-bow, in the ward of Cheap; and that the said Charles Steuart brought the said James Sommersett, his negro slave and property, along with him in the said voyage, from America aforesaid to this kingdom, as the negro slave and property of him the said Charles Steuart, to attend and serve him, during his stay and abiding in this kingdom, on the occasion aforesaid, and with an intent to carry the said James Sommersett back again into America, with him the said Charles Steuart, when the said affairs and business of the said Charles Steuart should be transacted; which said affairs and business of the said Charles Steuart are not yet transacted, and the intention of the said Charles Steuart to return to America as aforesaid hitherto hath continued and still continues. And I do further certify to our said lord the king, that the said James Sommersett did accordingly attend and serve the said Charles Steuart in this kingdom, from the time of his said arrival, until the said James Sommersett's departing and absenting him-

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SETT'S CASE.

—
Return to
the *habeas*
corpus.

SOMMER-
NETT'S CASE.

Return to
the *habeas*
corpus.

self from the service of the said Charles Steuart, herein-after mentioned, to wit, at London, &c.; and that before the coming of this writ to me, to wit, on —, at London, &c., the said James Sommersett, without the consent, and against the will of the said Charles Steuart, and without any lawful authority whatsoever, departed and absented himself from the service of the said Charles Steuart, and absolutely refused to return into the service of the said Charles Steuart, and serve the said Charles Steuart, during his stay and abiding in this kingdom, on the occasion aforesaid: whereupon the said Charles Steuart afterwards and before the coming of this writ to me, to wit, on —, on board the said vessel called the “Ann and Mary,” then and still lying in the river Thames, to wit, at London, &c., and then and still bound upon a voyage for Jamaica aforesaid, did deliver the said James Sommersett unto me, who then was, and yet am master and commander of the said vessel, to be by me safely and securely kept and carried and conveyed, in the said vessel, in the said voyage to Jamaica aforesaid, to be there sold as the slave and property of the said Charles Steuart; and that I did thereupon then and there, to wit, at London, &c., receive and take, and have ever since kept and detained the said James Sommersett in my care and custody, to be carried by me in the said voyage to Jamaica aforesaid, for the purpose aforesaid. And this is the cause of my taking and detaining the said James Sommersett, whose body I have now ready as by the said writ I am commanded.

Argument.

Upon this return Mr. Hargrave’s argument (*h*) on behalf of Sommersett was as follows:—

Statement
of the case.

The case before the court, when expressed in few words, is this:—Mr. Steuart purchases a negro slave in Virginia, where by the law of the place negroes are slaves, and saleable as other property. He comes into England, and

(*h*) This argument, which was a court as above set out, is contained in written composition not delivered in Hargr. Juriscons. Exerc., vol. i. p. 6.

brings the negro with him. Here the negro leaves Mr. Stuart's service without his consent; and afterwards persons employed by him seize the negro, and forcibly carry him on board a ship bound to Jamaica, for the avowed purpose of transporting him to that island, and there selling him as a slave. On an application by the negro's friends, a writ of *habeas corpus* is granted; and in obedience to the writ he is produced before this court, and here sues for the restitution of his liberty.

SOMMER-
SETT'S CASE.
—
Mr. Har-
grave's
Argument.

The questions arising on this case are highly interesting to the whole community, and cannot be decided without having the most general and important consequences; without extensive influence on private happiness and public security. The right claimed by Mr. Stuart to the detention of the negro is founded on the condition of slavery, in which he was before his master brought him into England; and if that right is here recognised, domestic slavery, with its horrid train of evils, may be lawfully imported into this country, at the discretion of every individual, foreign and native. It will come not only from our own colonies, and those of other European nations; but from Poland, Russia, Spain and Turkey, from the coast of Barbary, from the western and eastern coasts of Africa, from every part of the world, where it still continues to torment and dishonour the human species; and by its universal reception, this country, so famous for public liberty, will become the chief seat of private tyranny.

Importance
of the case.

In speaking on this case, I shall arrange my observations under two heads. First, I shall consider the right which Mr. Stuart claims in the person of the negro. Secondly, I shall examine Mr. Stuart's authority to enforce that right, if he has any, by imprisonment of the negro and transporting him out of this kingdom. The court's opinion in favour of the negro, on either of these points, will entitle him to a discharge from the custody of Mr. Stuart.

Points
which arise
in the case.

SOMMER-
SETT'S CASE.

Mr. Har-
grave's
Argument.
1st point—
the right
claimed in
the slave's
person.

Slavery, the
foundation
of the claim.

General
observations
on domestic
slavery.

Difficulty of
defining
slavery.

I. The first point, concerning Mr. Steuart's right in the person of the negro, is the great one, and that which, depending on a variety of considerations, requires the peculiar attention of the court. Whatever Mr. Steuart's right may be, it springs out of the condition of slavery, in which the negro was before his arrival in England, and wholly depends on the continuance of that relation; the power of imprisoning at pleasure here, and of transporting into a foreign country for sale as a slave, certainly not being exerciseable over an ordinary servant. Accordingly the return fairly admits slavery to be the sole foundation of Mr. Steuart's claim; and this brings the question, as to the present lawfulness of slavery in England, directly before the court.

Before I enter upon the inquiry into the present lawfulness of slavery in England, I think it necessary to make some general observations on slavery. I mean, however, always to keep in view slavery, not as it is in the relation of a subject to an absolute prince, but only as it is in the relation of the lowest species of servant to his master, in any state, whether free or otherwise in its form of government. Great confusion has ensued from discoursing on slavery, without due attention to the difference between the despotism of a sovereign over a whole people and that of one subject over another. The former is foreign to the present case; and therefore when I am describing slavery, or observing upon it, I desire to be understood as confining myself to the latter; though from the connection between the two subjects, some of my observations may perhaps be applicable to both.

Slavery has been attended in different countries with circumstances so various, as to render it difficult to give a general description of it. The Roman lawyer (i) calls slavery a constitution of the law of nations, by which one

(i) *Servitus est constitutio juris contra naturam subjeitur.* Dig. i. 5, gentium, quod quis dominio alieno s. 4, § 1.

is made subject to another contrary to nature. But this, as has been often observed by the commentators, is mistaking the law by which slavery is constituted for slavery itself, the cause for the effect; though it must be confessed that the latter part of the definition obscurely hints at the nature of slavery. Grotius (*k*) describes slavery to be an obligation to serve another for life, in consideration of being supplied with the bare necessities of life. Dr. Rutherford (*l*) rejects this definition, as implying a right to direct only the labours of the slave, and not his other actions. He therefore, after defining despotism to be an alienable right to direct all the actions of another, from thence concludes, that perfect slavery is an obligation to be so directed. This last definition may serve to convey a general idea of slavery; but like that by Grotius, and many other definitions which I have seen, if understood strictly, will scarce suit any species of slavery, to which it is applied. Besides, it omits one of slavery's severest and most usual incidents; the quality, by which it involves all the issue in the misfortune of the parent. In truth, as I have already hinted, the variety of forms in which slavery appears makes it almost impossible to convey a just notion of it in the way of definition. There are, however, certain properties which have accompanied slavery in most places; and by attending to these, we may always distinguish it from the mild species of domestic service so common and well known in our own country. I shall shortly enumerate the most remarkable of those properties; particularly such as characterise the species of slavery adopted in our American colonies, being that now under the consideration of this court. This I do, in order that a just conception may be formed of the propriety with which I shall impute to slavery the most per-

SOMMER-
SETT'S CASE.
—
Mr. Har-
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Argument.

(*k*) *Est autem servitus perfecta quæ perpetuas operas debet pro alimentis et aliis quæ vitæ necessitas exigit.*
De Jur. Bell., lib. ii. c. 5, s. 27,

§ 2.

(*l*) Inst. Nat. Law, bk. i. c. 20, s. 1.

SOMMER-
SETT'S CASE.

Mr. Har-
grave's
Argument.

Properties
usually
incident to
slavery.

Bad effects
of slavery.

icious effects. Without such a previous explanation, the most solid objections to the permission of slavery will have the appearance of unmeaning, though specious, declamation.

Slavery always imports an obligation of perpetual service, which only the consent of the master can dissolve. It generally gives to the master an arbitrary power of administering every sort of correction, however inhuman, not immediately affecting the life or limb of the slave; sometimes even these are left exposed to the arbitrary will of the master; or they are protected by fines, and other slight punishments, too inconsiderable to restrain the master's inhumanity.—It creates an incapacity of acquiring, except for the master's benefit.—It allows the master to alienate the person of the slave in the same manner as other property.—Lastly, it descends from parent to child, with all its severe appendages. This description agrees with almost every kind of slavery, formerly or now existing; except only that remnant of the ancient slavery, which still lingers in some parts of Europe, but qualified and moderated in favour of the slave by the humane provision of modern times.

From this view of the condition of slavery, it will be easy to derive its destructive consequences.—It corrupts the morals of the master, by freeing him from those restraints with respect to his slave, so necessary for control of the human passions.—It is dangerous to the master; because his oppression excites resentment and hatred in the slave, and the extreme misery of his condition prompts him to risk the gratification of them, and his situation daily furnishes the opportunity.—To the slave it communicates all the afflictions of life, leaving for him scarce any of its pleasures; and it depresses the excellence of his nature, by denying the ordinary means and motives of improvement.—It is dangerous to the state, by its corruption of those citizens on whom its prosperity depends; and by admitting within it a multitude

of persons, who being excluded from the common benefits of the constitution, are interested in scheming its destruction.—Hence it is, that slavery, in whatever light we view it, may be deemed a most pernicious institution: immediately so to the unhappy person who suffers under it; finally so to the master who triumphs in it, and to the state which allows it.

SOMMERSETT'S CASE.
Mr. Hargrave's Argument.

However, I must confess, that there are civilians of great credit who insist upon the utility of domestic slavery; founding themselves chiefly on the supposed increase of robbers and beggars, in consequence of its disuse. This opinion is favoured by Puffendorf (*m*) and Ulicus Huberus (*n*). In the dissertation on slavery prefixed to Potgieserus on the German law *De statu servorum*, the opinion is examined minutely and defended. To this opinion I oppose those ill consequences, which I have already represented as almost necessarily flowing from the permission of domestic slavery, the numerous testimonies against it, which are to be found in ancient and modern history, the example of those European nations, which have suppressed the use of it, after the experience of many centuries, and the more improved state of society. In justice also to the writers just mentioned, I must add, that though they contend for the advantages of domestic slavery, they do not seem to approve of it, in the form and extent in which it has generally been received, but under limitations, which would certainly render it far more tolerable. Huberus, in his *Eunomia Romana* (*o*) has a remarkable passage, in which, after recommending a mild slavery, he cautiously distinguishes it from that cruel species, the subject of commerce between Africa and America. His words are:—*Loquor de servitute, qualis apud civiliores populos in usu*

Opinions of modern writers in favour of slavery under restrictions.

(*m*) Law of Nature and Nations, s. 6.

bk. vi. c. 3, s. 10.

(*o*) Page 49.

(*n*) Prælect. Jur. Civ., lib. i. tit. 4,

SOMMER-
SETT'S CASE.

Mr. Har-
grave's
Argument.

Origin of
slavery, its
general law-
fulness con-
sidered.

*fuit; nec enim exempla barbarorum, vel quæ nunc ab Africa
in Americam fiunt hominum commercia, velim mihi quis-
quam objiciat.*

The great origin of slavery is captivity in war, though sometimes it has commenced by contract. It has been a question much agitated, whether either of these foundations of slavery is consistent with natural justice. It would be engaging in too large a field of inquiry, to attempt reasoning on the general lawfulness of slavery. I trust, too, that the liberty, for which I am contending, doth not require such a disquisition; and am impatient to reach the part of my argument, in which I hope to prove slavery reprobated by the law of England as an inconvenient thing. Here, therefore, I shall only refer to some of the most eminent writers, who have examined how far slavery founded on captivity or contract is conformable to the law of nature, and shall just hint at the reasons which influence their several opinions. The ancient writers suppose the right of killing an enemy vanquished in a just war; and thence infer the right of enslaving him. In this opinion, founded, as I presume, on the idea of punishing the enemy for his injustice, they are followed by Albericus Gentilis (*p*), Grotius (*q*), Puffendorf (*r*), Bynkershoek (*s*), and many others. But in *The Spirit of Laws* (*t*), the right of killing is denied, except in case of absolute necessity and for self-preservation. However, where a country is conquered, the author seems to admit the conqueror's right of enslaving for a short time, that is, till the conquest is effectually secured. Dr. Rutherford (*u*), not satisfied with the right of killing a vanquished enemy, infers the right of enslaving him, from the conqueror's right to

(*p*) De Jur. Gent., cap. De servi-
tute.

(*q*) De Jur. Bell., lib. iii. c. 7,
s. 5.

(*r*) Law of Nature and Nations,

bk. vi. c. 3, s. 6.

(*s*) Quæst. Jur. Publ., lib. i. c. 3.

(*t*) Bk. iv. c. 2.

(*u*) Inst. Nat. Law, vol. i. p. 481,
vol. ii. p. 573.

a reparation in damages for the expenses of the war. I do not know that this doctrine has been examined; but I must observe, that it seems only to warrant a temporary slavery, till reparation is obtained from the property or personal labour of the people conquered. The lawfulness of slavery by contract is assented to by Grotius and Puffendorf (*x*), who found themselves on the maintenance of the slave, which is the consideration moving from the master. But a very great writer (*y*) of our own country controverts the sufficiency of such a consideration. Mr. Locke has framed another kind of argument against slavery by contract (*z*); and the substance of it is, that a right of preserving life is unalienable; that freedom from arbitrary power is essential to the exercise of that right; and therefore, that no man can by compact enslave himself. Dr. Rutherford (*a*) endeavours to answer Mr. Locke's objection, by insisting on various limitations to the despotism of the master; particularly, that he has no right to dispose of the slave's life at pleasure. But the misfortune of this reasoning is, that though the contract cannot justly convey an arbitrary power over the slave's life, yet it generally leaves him without a security against the exercise of that or any other power. I shall say nothing of slavery by birth; except that the slavery of the child must be unlawful, if that of the parent cannot be justified; and that when slavery is extended to the issue, as it usually is, it may be unlawful as to them, even though it were not so as to their parents. In respect to slavery used for the punishment of crimes against civil society, it is founded on the same necessity, as the right of inflicting other punishments, never extends to the offender's issue, and seldom

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(*x*) See Grot. Jur. Bell., lib. ii. c. 5, ss. 30—32, and Puf. Law of Nature and Nations, bk. vi. c. 3, s. 4.

Com. 224, n.

(*z*) Locke on Governm., bk. ii. c. 4.

(*y*) 1 Bla. Com. 423; 2 Steph.

(*a*) Inst. Nat. Law, vol. i. p. 480, 481.

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is permitted to be domestic, the objects of it being generally employed in public works, as the galley-slaves are in France. Consequently, this kind of slavery is not liable to the principal objections which occur against slavery in general. Upon the whole of this controversy concerning slavery, I think myself warranted in saying, that the justice and lawfulness of every species of it, as it is generally constituted, except the limited one founded on the commission of crimes against civil society, is at least doubtful; that if in any case lawful, such circumstances are necessary to make it so, as seldom concur, and therefore render a just commencement of it barely possible; and that the oppressive manner in which it has generally commenced, the cruel means necessary to enforce its continuance, and the mischiefs ensuing from the permission of it, furnish very strong presumptions against its justice, and at all events evince the humanity and policy of those states, in which the use of it is no longer tolerated.

Universality
of domestic
slavery
amongst the
ancients.

But however reasonable it may be to doubt the justice of domestic slavery, however convinced we may be of its ill effects, it must be confessed, that the practice is ancient and has been almost universal. Its beginning may be dated from the remotest period, in which there are any traces of the history of mankind. It commenced in the barbarous state of society, and was retained, even when men were far advanced in civilization. The nations of antiquity most famous for countenancing the system of domestic slavery were the Jews, the Greeks, the Romans, and the ancient Germans (*b*); amongst all of whom it prevailed, but in various degrees of severity. By the ancient Germans it was continued in the countries they over-ran; and so was transmitted to the various kingdoms

(*b*) A kind of slavery seems to have existed amongst the ancient Germans before they emigrated from their own country. *Cæs. De Bell. Gall., lib. vi.*

cap. 13; *Tac. De Mor. German., cap. 24, 25*; *Potgies. De stat. servor. apud Germ., lib. i. cap. 1.*

and states, which arose in Europe out of the ruins of the Roman empire. At length, however, it fell into decline in most parts of Europe; and amongst the various causes which contributed to this alteration, none were probably more effectual than experience of the disadvantages of slavery, the difficulty of continuing it, and a persuasion that the cruelty and oppression almost necessarily incident to it were irreconcilable with the pure morality of the Christian dispensation (*c*). The history of its decline in Europe has been traced by many eminent writers, particularly Bodin (*d*), Albericus Gentilis (*e*), Potgieserus (*f*), Dr. Robertson (*g*), and Mr. Millar (*h*). It is sufficient here to say that this great change began in Spain, according to Bodin, about the end of the eighth century, and was become general before the middle of the fourteenth century. Bartolus, the most famed commentator on the civil law in that period, represents slavery as in disuse; and the succeeding commentators hold much the same language. However, they must be understood with many restrictions and exceptions, and not to mean that slavery was completely and universally abolished in Europe. Some modern civilians, not sufficiently attending to this circumstance, rather too hastily reprehend their predecessors for representing slavery as disused in Europe. The truth is, that the ancient species of slavery by frequent emancipations became greatly diminished in extent: the remnant of it was considerably abated in severity; the disuse of the practice of enslaving captives taken in the wars between Christian powers assisted in preventing the further increase of domestic slavery; and in some countries of Europe, particularly England, a still more effectual method, which I shall explain hereafter, was thought of to perfect the

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(*c*) See Montesquieu *Espr. des Loix*, liv. xv. c. 5.

(*d*) *De Republicâ*, lib. i. cap. 5.

(*e*) *Jur. Gent.*, cap. *De servitute*.

(*f*) *Jur. Germ.*, *Destatus servorum*.

(*g*) *Life of Charles V.* (ed. 1769), vol. i. p. 268.

(*h*) *Origin of the Distinction of Ranks*. See also *Tayl. Elem. Civ. L.*, 433 *et seq.*

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domestic
slavery in
America.

suppression of it. Such was the expiring state of domestic slavery in Europe at the commencement of the sixteenth century, when the discovery of America and of the western and eastern coasts of Africa gave occasion to the introduction of a new species of slavery. It took its rise from the Portuguese, who, in order to supply the Spaniards with persons able to sustain the fatigue of cultivating their new possessions in America, particularly the islands, opened a trade between Africa and America for the sale of negro slaves. This disgraceful commerce in the human species is said to have begun in the year 1508, when the first importation of negro slaves was made into Hispaniola from the Portuguese settlements on the Western Coasts of Africa (i). In 1540 the Emperor Charles V. endeavoured to stop the progress of the negro slavery, by orders that all slaves in the American isles should be made free, and they were accordingly manumitted by Lagasca, the governor of the country, on condition of continuing to labour for their masters. But this attempt proved unsuccessful, and on Lagasca's return to Spain domestic slavery revived and flourished as before (j). The expedient of having slaves for labour in America was not long peculiar to the Spaniards; being afterwards adopted by the other Europeans, as they acquired possessions there. In consequence of this general practice, negroes are become a very considerable article in the commerce between Africa and America; and domestic slavery has taken so deep a root in most of our own American colonies, as well as in those of other nations, that there is little probability of ever seeing it generally suppressed.

The attempt
to introduce
the slavery
of negroes
into England
examined.

Here I conclude my observations on domestic slavery in general. I have exhibited a view of its nature, of its bad tendency, of its origin, of the arguments for and against its justice, of its decline in Europe, and the introduction of a

(i) Anderson, Hist. Comm., vol. ii.
pp. 15, 16.

(j) Bodin, De Repub., lib. i. c. 5.

new slavery by the European nations into their American colonies. I shall now examine the attempt to obtrude this new slavery into England. And here it will be material to observe, that if on the declension of slavery in this and other countries of Europe, where it is discountenanced, no means had been devised to obstruct the admission of a new slavery, it would have been vain and fruitless to have attempted superseding the ancient species. But I have to prove that our ancestors at least were not so short-sighted; and that long and uninterrupted usage has established rules, as effectual to prevent the revival of slavery, as their humanity was successful in once suppressing it. I shall endeavour to show that the law of England never recognised any species of domestic slavery, except the ancient one of villenage now expired, and has sufficiently provided against the introduction of a new slavery under the name of villenage (*k*) or any other denomination whatever. This proposition I hope to demonstrate from the following considerations:—

1st. I apprehend that this will appear to be the law of England from the manner of making title to a villein.

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The only slavery our law books take the least notice of is that of a villein; by whom was meant, not the mere tenant by villein services, who might be free in his person, but the villein in blood and tenure; and as the English law has no provisions to regulate any other slavery, therefore no slavery can be lawful in England, except such as will consistently fall under the denomination of villenage.

Argument
from the
manner of
making title
to a villein.

The condition of a villein had most of the incidents which I have before described in giving the idea of slavery in general. His service was uncertain and indeterminate, such as his lord thought fit to require; or, as some of our ancient writers (*l*) express it, he knew not in the evening

The condition of
a villein.

(*k*) Villenage is used to express sometimes the tenure of lands held by villein-services, and sometimes the personal bondage of the villein;

throughout this argument it is applied in the latter sense only.

(*l*) Co. Litt. 116, b.

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what he was to do in the morning, he was bound to do whatever he was commanded. He was liable to beating, imprisonment, and every other chastisement his lord might prescribe, except killing and maiming (*m*). He was incapable of acquiring property for his own benefit, the rule being *quicquid acquiritur serro, acquiritur domino* (*n*). He was himself the subject of property; as such, saleable and transmissible. If he was a villein regardant (*o*), he passed with the manor or land to which he was annexed, but might be severed at the pleasure of his lord (*p*). If he was a villein in gross, he was an hereditament or a chattel real according to his lord's interest; being descendible to the heir where the lord was absolute owner, and transmissible to the executor where the lord had only a term of years in him (*q*). Lastly, the slavery extended to the issue, if both parents were villeins, or if the father only was a villein; our law deriving the condition of the child from that of the father, contrary to the Roman law, in which the rule was *partus sequitur ventrem* (*r*). The origin of villanage is principally (*s*) to be derived from the wars between our British, Saxon, Danish, and Norman ancestors, whilst they were contending for the possession of this country. Fitzherbert supposes villanage to have commenced at the Conquest, by the distribution then made of the forfeited lands

(*m*) Termes de la Ley, *roc*. Villanage; Old Tenures, chap. Villanage; Fitzh. Abr. Coron. 17; 2 Ro. Abr. 1; 2 Inst. 45; Co. Litt. 126, 127.

(*n*) Co. Litt. 117, a.

(*o*) Villeins were either in gross or regardant. Villeins in gross were liable to any commands of their masters. Villeins regardant were attached to particular manors, and were not transferable by sale unless with the lands to which they were attached.

(*p*) Litt. s. 181.

(*q*) Bro. Abr. Villanage, 60; Co. Litt. 117.

(*r*) Litt. s. 187; Co. Litt. 123; Fortescue, Laud. Leg. Angl., c. 42; Lytt. Tenures, by Tomlins, 221 (*g*).

(*s*) Not wholly, because there were probably slaves in England before the first arrival of the Saxons, who, moreover, as well as the Danes, might bring some few from their own country.

and of the vanquished inhabitants resident upon them (*t*). But there were many bondmen in England before the Conquest, as appears by the Anglo-Saxon laws regulating them; and, therefore, it would be nearer the truth to attribute the origin of villeins, as well to the preceding wars and revolutions in this country, as to the effects of the Conquest (*u*).

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After the Conquest many things happily concurred, first, to check the progress of domestic slavery in England, and, finally, to suppress it. The cruel custom of enslaving captives in war being abolished, from that time the accession of a new race of villeins was prevented, and the humanity, policy, and necessity of the times were continually wearing out the ancient race. Sometimes, no doubt, manumissions were freely granted; but they probably were much oftener extorted during the rage of the civil wars, so frequent before the reign of Henry VII., about the forms of the constitution or the succession to the Crown.

Decline of
villanage.

Another cause, which greatly contributed to the extinction of villanage, was the discouragement of it by the courts of justice. They always presumed in favour of liberty, throwing the *onus probandi* upon the lord, as well in the writ of *homine replegiando*, where the villein was plaintiff, as in the *nativo habendo*, where he was defendant (*x*).

(*t*) See the Treatise on Surveying (A.D. 1539) attributed to Fitzherbert, chap. 13. The author of this Treatise, referring to the customary tenants of a manor, says, "In my opinion [this tenure] began soon after the Conquest. When William Conqueror had conquered the realm he rewarded all those who came with him in his voyage royal according to their degrees. And to honourable men he gave lordships, manors, lands, and tenements, with all the inhabitants, men and women, dwelling in the

same, to do with them at their pleasure." And so the king's grantees, with a view to the tillage of their lands, "pardoned the inhabitants of their lives and caused them to do all manner of service."

(*u*) Spelm. Gloss. *ad verb.* "*Lazzi*," "*Servus*;" Somner on Gavolk. 65; Ancient Laws and Institutes of England, Index, tit. "*Servus*;" and see 1 Stubbs, Const. Hist., 426-431.

(*x*) Lib. Intrat. 176, b., 177, a.;

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Manumissions were inferred from the slightest circumstances of mistake or negligence in the lord, from every act or omission which legal refinement could strain into an acknowledgment of the villein's liberty. If the lord vested the ownership of lands in the villein, received homage from him, or gave a bond to him, he was enfranchised. Suffering the villein to be on a jury, to enter into religion and be professed, or to stay a year and a day in ancient demesne without claim, were enfranchisements. Bringing ordinary actions against him, joining with him in actions, answering to his actions without protestation

Bro. Abr. Villenage, 66; 3 Bla. Com. 129.

The lord's remedy for a fugitive villein was, either by seizure, or by suing out a writ of *nativo habendo*, or *neifty*.

If the lord seized, the villein's most effectual mode of recovering liberty was by the writ of *homine replegiando*, which had great advantage over the writ of *habeas corpus*. In the *habeas corpus* the return cannot be contested by pleading against the truth of it, and consequently on a *habeas corpus* the question of liberty cannot go to a jury for trial; though indeed the party making a false return is liable to an action for damages, and punishable by the court for a contempt; and the court will hear affidavits against the truth of the return, and if not satisfied with it restore the party to his liberty. Therefore, if to a *habeas corpus* villenage was returned as the cause of detainer, the person for whom the writ was sued at the utmost could only have obtained his liberty for the time, and could not have had a regular and final trial of the question. But in the *homine replegiando* it was otherwise; for if villenage was re-

turned, an *alias* issued directing the sheriff to replevy the party on his giving security to answer the claim of villenage afterwards, and the plaintiff might declare for false imprisonment and lay damages, and on the defendant's pleading the villenage had the same opportunity of contesting it, as when impleaded by the lord in a *nativo habendo*.

If the lord sued out a *nativo habendo*, and the villenage was denied, in which case the sheriff could not seize the villein, the lord was then to enter his plaint in the county court; and as the sheriff was not allowed to try the question of villenage in his court, the lord could not have any benefit from the writ without removing the cause into the King's Bench or Common Pleas. Rast. Entr. 436, 437.

As to the tenure of villenage and the condition of villeins, see Serjt. Heywood, Ranks of the People under the Anglo-Saxon Governments, pp. 363, 365; Lytt. Tenures, by Tomlins, bk. ii. chap. 11, "Villenage;" 1 Millar, Eng. Gov. 127, 128, 312; and Digby, Hist. of Law of Real Prop. p. 109.

of villenage, imparling (*y*) in them or assenting to imparlance, or suffering him to be vouched without counterpleading the voucher, were also enfranchisements by implication of law (*z*). Most of the constructive manumissions I have mentioned were the received law, even in the reign of the first Edward (*a*). The anxiety of our ancestors to emancipate the ancient villeins well accounts for the establishment of rules of law calculated to obstruct the introduction of a new stock. It was natural that the same opinions, which influenced to discountenance the former, should lead to the prevention of the latter.

I shall not attempt to follow villenage in the several stages of its decline, it being sufficient here to mention the time of its extinction, which, as all agree, happened about the latter end of Elizabeth's reign or soon after the accession of James (*b*). One of the last instances, in which villenage was insisted upon, was *Crouch's Case* (*c*). From the 15th of James I. (*d*), being more than 150 years ago, the claim of villenage has not been heard of in our courts of justice; and nothing can be more notorious, than that the race of persons who were once the objects of it was, about that time, completely worn out by the continual and united operation of deaths and manumissions.

But though villenage itself is obsolete, yet fortunately

(*y*) *i.e.*, *licentia interloquendi*, or obtaining time to plead in the action; *vide* Toml. Law Dict. *ad verb.* "Imparlance;" 1 Steph. Com. 217.

(*z*) Litt. ss. 202-209; 2 Ro. Abr. 735, 736, 737; 2 Bla. Com. 94.

(*a*) See Britt. cap. 31; Mirror of Justices, cap. 2, s. 28.

(*b*) Smith's Commonwealth, bk. iii. c. 10.

(*c*) *Butler v. Crouch*, Dy. 266, pl. 11; *Fleyer v. Crouch*, *Id.* 283, pl. 32.

(*d*) See *Pigg v. Caley*, Noy, R. 27, Hil. T. 15 Jac. 1. The plaintiff there sued defendant in trespass for taking his horse. Defendant pleaded that he was seised of the manor of D., to which plaintiff was a villein regardant, and that defendant and those seised of the said manor had been seised of the plaintiff and his ancestors. Plaintiff replied that he was free, and this issue was found for the plaintiff.

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those rules, by which the claim of it was regulated, are not yet buried in oblivion. These the industry of our ancestors has transmitted; nor let us their posterity despise the reverend legacy. By a strange progress of human affairs, the memory of slavery expired now furnishes one of the chief obstacles to the introduction of slavery attempted to be revived; and the venerable reliques of the learning relative to villenage, so long consigned to gratify the investigating curiosity of the antiquary, or used as a splendid appendage to the ornaments of the scholar, must now be drawn forth from their faithful repositories for a more noble purpose; to inform and guide the sober judgment of this court, and, as I trust, to preserve this country from the miseries of domestic slavery.

Manner of
making title
to a villein

Littleton says (*e*), every villein is either a villein by title of prescription, to wit, that he and his ancestors have been villeins out of memory, or he is a villein by his own confession in a court of record (*f*). And in another place (*g*), his description of a villein regardant and of a villein in gross shows that title cannot be made to either without prescription or confession. Time whereof no memory runs to the contrary is an inseparable incident to every prescription (*h*), and therefore, according to Littleton's account of villenage, the lord must prove the slavery ancient and immemorial; or the villein must solemnly confess it to be so in a court of justice. A still earlier writer lays down the rule in terms equally strong. No one, says Britton (*i*), can be a villein except of ancient nativity, or by acknowledgment. All the proceedings in cases of villenage, when contested, conform to this idea of remote antiquity in the slavery, and are quite irreconcilable with one of modern commencement.

(*e*) S. 175.

(*f*) Lord Mansfield, C. J., observes (20 St. Tr. 78) that the last confession of villenage extant is in the 19th

year of Hen. 6.

(*g*) Ss. 181, 182, 185.

(*h*) Litt. s. 170.

(*i*) Cap. 31.

1. The villein in all such suits between him and his lord was styled *nativus* as well as *villanus*; our ancient writers describe a female slave by no other name than that of *neif* (*k*); and the technical name of the only writ in the law for the recovery of a villein is equally remarkable, being always called the *nativo habendo*, or writ of *neifty*. This peculiarity of denomination, which implies that villenage is a slavery by birth, might perhaps of itself be deemed too slight a foundation for any solid argument; but when combined with other circumstances more decisive, it is not without very considerable force.

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2. In pleading villenage where it had not been confessed on some former occasion, the lord always founded his title on prescription. Our Year Books, and books of entries, are full of the forms used in pleading a title to villeins regardant. In the *homine replegiando*, and other actions where the plea of villenage was for the purpose of showing the plaintiff's disability to sue, if the villein was regardant, the defendant alleged, that he was seised of such a manor, and that the plaintiff and his ancestors had been villeins belonging to the manor time out of mind, and that the defendant and his ancestors and all those whose estate he had in the manor had been seised of the plaintiff and all his ancestors as of villeins belonging to it (*l*). In the *nativo habendo* the form of making title to a villein regardant was in substance the same (*m*). In fact, regardancy necessarily implies prescription, being where one and his ancestors have been annexed to a manor time out of the memory of man (*n*). As to villeins in gross, the cases relative to them are very few; and I am inclined to think, that there was never any great number of them in England. The author of the Mirror (*o*), who wrote

(*k*) Brit. cap. 31; Litt. s. 186.

Rast. Entr. 401.

(*l*) Rast. Entr., tit. "*Homine replegiando*;" Lib. Intrat. 56.

(*n*) Litt. s. 182.

(*o*) Mirr. c. 2, s. 28.

(*m*) See the form, Lib. Intrat. 97;

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in the reign of Edward II., only mentions villeins regardant: and Sir Thomas Smith, who was Secretary of State in the reign of Edward VI., says, that in his time he never knew a villein in gross throughout the realm (*p*). However, after a long search, I do find places in the Year Books, where the form of alleging villanage in gross is expressed, not in full terms, but in a general way; and in all the cases I have yet seen, the villanage is alleged in the ancestors of the person against whom it was pleaded (*q*), and in one of them the words "time beyond memory" are added (*r*). But if precedents had been wanting, the authority of Littleton, according to whom the title of villanage of each kind, unless it has been confessed, must be by prescription, would not have left the least room for supposing the pleading of a prescription less necessary on the claim of villeins in gross than of those regardant.

3. The kind of evidence which the law required to prove villanage, and allowed in disproof of it, is only applicable to a slavery in blood and family, one uninterruptedly transmitted through a long line of ancestors to the person against whom it was alleged. On the lord's part it was necessary that he should prove the slavery against his villein by other villeins of the same blood (*s*), such as were descended from the same common male stock, and would acknowledge themselves villeins to the lord, or those from whom he derived his title; and at least two witnesses (*t*) of this description were requisite for the

(*p*) Smith's Commonwealth, bk. iii. c. 10; 1 Steph. Com. 218; *per* Lord Stowell, 2 Hagg. Adm. R. 107.

Villeins regardant survived some time longer. See *per* Lord Mansfield, C. J., 20 St. Tr. 69; *per* Lord Stowell, 2 Hagg. Adm. R. 108.

(*q*) See Year Bk. 7 Edw. 2, p. 242; 11 Edw. 2, p. 344. In Year Bk. 13 Edw. 4, 2 b, pl. 4, and 3 b, pl. 11,

there is a case in which villanage in gross is pleaded, where one became a villein in gross by severance from the manor to which he had been regardant.

(*r*) Year Bk. 11 Edw. 2, 344.

(*s*) Bro. Abr. Villanage, 66; Fitz. Abr. Villanage, 38, 39.

(*t*) Fitz. Nat. Br. 78; Fitzh. Abr. Villanage, 36, 37.

purpose. Nay, so strict was the law in this respect, that in the *nativo habendo* the defendant was not obliged to plead to the claim of villenage, unless the lord at the time of declaring on his title brought his witnesses with him into court, and they acknowledged themselves villeins, and swore to their consanguinity with the defendant (*u*); and if the plaintiff failed in adducing such previous evidence, the judgment of the court was, that the defendant should be free for ever, and the plaintiff was amerced for his false claim (*x*). In other actions the production of suit or witnesses by the plaintiff, previously to the defendant's pleading, fell into disuse some time in the reign of Edward III.; and ever since, the entry of such production on the rolls of the court has been mere form, being always with an &c., and without naming the witnesses. But in the *nativo habendo* the actual production of the suit, and also the examination of them, unless the defendant released it in court (*y*), continued to be indispensable even down to the time when villenage expired (*z*). Such was the sort of testimony by which only the lord could support the title of slavery: nor were the means of defence on the part of the villein less remarkable. If he could prove that the slavery was not in his blood and family, he entitled himself to liberty (*a*). But the special defences which the law permitted against villenage are still more observable; and prove it beyond a contradiction to be what the author of the Mirror (*a*) emphatically styles it, a slavery of so great an antiquity that no free stock can be found by human remembrance. Whenever the lord sued to recover a villein by a *nativo habendo*, or alleged villenage in other actions as a disability to sue, the person claimed as a villein might either plead generally that he was of free condition, and on the trial of this

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(*u*) Fitzh. Nat. Br. 78; Fitzh. Abr. Villenage, 32; Lib. Intrat. 97; Rast. Entr. 401.

(*x*) Fitzh. Abr. Villenage, 38.

(*y*) Year Bk. 19 Hen. 6, 32, b.

(*z*) See *Jerney v. Finch*, Co. Entr. 406, b.

(*a*) *Mirr. c. 2, s. 28.*

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general issue avail himself of every kind of defence which the law permits against villénage; or he might plead specially any single fact or thing, which, if true, was of itself a legal bar to the claim of villénage, and in that case the lord was compellable to answer the special matter. Of this special kind were the pleas of bastardy and adventif. The former was an allegation by the supposed villein that either himself or his father, grandfather, or other male ancestor, was born out of matrimony; and this plea, however remote the ancestor in whom the bastardy was alleged, was peremptory to the lord; that is, if true, it destroyed the claim of villénage, and therefore the lord could only support his title by denying the fact of bastardy (*b*). The law of England always derives the condition of the issue from that of the father, and the father of a bastard being in law uncertain (*c*), it was, therefore, impossible to prove a bastard a slave by descent. In respect to the plea of adventif, there is some little confusion in the explanation our Year Books give us of the persons to whom the description of adventif is applicable; but the form of the plea will best show the precise meaning of it. It alleged (*d*), that either the person himself who was claimed as a villein regardant to a manor, or one of his ancestors, was born in a county different from that in which the manor was, and so was free, which was held to be a necessary conclusion to the plea. This in general was the form of the plea, but sometimes it was more particular, as in the following case (*e*):—In trespass, the defendant pleads that the plaintiff is his villein regardant to his manor of Dale; the plaintiff replies that his great-grandfather was born in C., in the county of N., and from thence went into the county of S., and took lands held in

(*b*) Year Bk. 13 Edw. 2, p. 408; Fitzh. Abr. Villénage, 32; Bro. Abr. Villénage, 7; Lytt. Tenures, by Tomlins, 222; Co. Litt. 123, a.; Year Bk. 43 Edw. 3, p. 4.

(*c*) Co. Litt. 123, a.

(*d*) Fitzh. Abr. Villénage, 24, 32, 33, 36; Fitzh. Abr. Visne, 2.

(*e*) Fitzh. Abr. Visne, 1.

bondage within the manor to which the plaintiff is supposed to be a villein regardant, and so after time of memory his great-grandfather was *adventif*. It is plain from this case that the plea of *adventif* was calculated to destroy the claim to villenage regardant, by showing that the connection of the supposed villein and his ancestors with the manor to which they were supposed to be regardant, had begun within time of memory; and as holding lands by villein-services was anciently deemed a mark (*f*), though not a certain one, of personal bondage, I conjecture that this special matter was never pleaded, except to distinguish the mere tenant by villein-services from the villein in blood as well as tenure. But whatever might be the cases proper for the plea of *adventif*, it is one other incontrovertible proof, in addition to the proofs already mentioned, that no slavery having had commencement within time of memory was lawful in England; and that if one ancestor could be found whose blood was untarnished with the stain of slavery, the title of villenage was no longer capable of being sustained.

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Such were the striking peculiarities in the manner of making title to a villein, and of contesting the question of liberty; and it is scarce possible to attend to the enumeration of them, without anticipating the inferences I have to make. The law of England only knows slavery by birth; it requires prescription in making title to a slave; it receives on the lord's part no testimony except such as proves the slavery to have been always in the blood and family, on the villein's part every testimony which proves the slavery to have been once out of his blood and family; it allows nothing to sustain the slavery except what shows its commencement beyond the time of

The rules of
law concern-
ing villenage
exclude a
new slavery.

(*f*) "If a man dwells on lands which have been held in villenage time out of mind, he shall be a villein, and it is a good prescription; and against this prescription it is a good plea to say that his father or grandfather was *adventif*." Fitzh. Abr. Villenage, 24.

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memory, everything to defeat the slavery which evinces its commencement within the time of memory. But in our American colonies and other countries slavery may be by captivity or contract as well as by birth ; no prescription is requisite ; nor is it necessary that slavery should be in the blood and family, and immemorial. Therefore the law of England is not applicable to the slavery of our American colonies, or of other countries. If the law of England would permit the introduction of a slavery commencing out of England, the rules it prescribes for trying the title to a slave would be applicable to such a slavery ; but they are not so ; and from thence it is evident that the introduction of such a slavery is not permitted by the law of England. The law of England, then, excludes every slavery not commencing in England, every slavery though commencing there not being ancient and immemorial. Villenage is the only slavery which can possibly answer to such a description, and that has long expired by the deaths and emancipations of all those who were once the objects of it. Consequently there is now no slavery which can be lawful in England, until the legislature shall interpose its authority to make it so.

This is plain reasoning ; it wants no aid from the colours of art, or the embellishments of language ; it is composed of necessary inferences from facts and rules of law, which do not admit of contradiction ; and I think that it must be vain to attempt shaking a superstructure raised on such solid foundations.

As to the other arguments I have to adduce against the revival of domestic slavery, I do confess that they are merely presumptive. But then I must add, that they are strong and violent presumptions ; such as furnish more certain grounds of judicial decision than are to be had in many of the cases which become the subjects of legal controversy. For—

2ndly. I infer that the law of England will not permit

Argument
against a

a new slavery, from the fact of there never yet having been any slavery but villenage, and from the actual extinction of that ancient slavery. If a new slavery could have lawfully commenced here, or lawfully have been introduced from a foreign country, is there the most remote probability, that in the course of so many centuries a new slavery should never have arisen? If a new race of slaves could have been introduced under the denomination of villeins—if a new slavery could have been from time to time engrafted on the ancient stock, would the laws of villenage have once become obsolete for want of objects, or would not a successive supply of slaves have continued their operation to the present times? But, notwithstanding the vast extent of our commercial connections, the fact is confessedly otherwise. The ancient slavery has once expired; neither natives nor foreigners have yet succeeded in the introduction of a new slavery; and from thence the strongest presumption arises, that the law of England does not permit such an introduction.

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new slavery—founded on the extinction of villenage;

3rdly. I insist, that the unlawfulness of introducing a new slavery into England, from our American colonies or any other country, is deducible from the rules of the English law concerning contracts of service. The law of England will not permit any man to enslave himself by contract. The utmost, which our law allows, is a contract to serve for life; and some perhaps may even doubt the validity of such a contract, there being no determined cases directly affirming its lawfulness (*g*). Certain also it is that a service for life in England is not usual, except in the case of a military person; whose service, though in effect for life, is rather so by the operation of the yearly acts for regulating the army, and of the perpetual act for governing the navy, than in consequence of any express agreement (*h*). However, I do not mean absolutely to deny the lawfulness of agreeing to serve for life

—on the rules of law against slavery by contract.

(*g*) Bro. Abr. Dett. 53. (*h*) See note to *Sutton v. Johnson*, *post*, Pt.

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nor will the inferences I shall draw from the rules of law concerning servitude by contract be in the least affected by admitting such agreements to be lawful. The law of England may perhaps give effect to a contract of service for life; but that is the *ne plus ultra* of servitude by contract in England. It will not allow the servant to invest the master with an arbitrary power of correcting, imprisoning (*i*), or alienating him; it will not permit him to renounce the capacity of acquiring and enjoying property, or to transmit a contract of service to his issue (*j*). In other words, it will not permit the servant to incorporate into his contract the ingredients of slavery. And why is it that the law of England rejects a contract of slavery? The only reason to be assigned is, that the law of England, acknowledging only the ancient slavery which is now expired, will not allow the introduction of a new species, even though founded on consent of the party. The same reason operates with double force against a new slavery founded on captivity in war, and introduced from another country. Will the law of England condemn a new slavery commencing by consent of the party, and at the same time approve of one founded on force, and most probably on oppression also? Will the law of England invalidate a new slavery commencing in this country, when the title to the slavery may be fairly examined; and at the same time give effect to a new slavery introduced from another country, when disproof of the slavery must generally be impossible? This would be rejecting and receiving a new slavery at the same moment; rejecting slavery the least odious, receiving slavery the most odious: and by such an inconsistency, the wisdom and justice of the English law would be completely dishonoured. Nor will this reasoning be weakened by observing that our law permitted villenage, which was a slavery confessed to originate from force and captivity in

(*i*) *Post*, p. 97.

(*j*) Molloy, de Jur. Marit. bk. iii. c. 1, s. 7.

war; because that was a slavery coeval with the first formation of the English constitution, and consequently had a commencement here prior to the establishment of those rules which the common law furnishes against slavery by contract.

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Having thus explained the three great arguments which I oppose to the introduction of domestic slavery from our American colonies, or any foreign country, it is now proper to inquire, how far the subject is affected by the cases and judicial decisions since or just before the extinction of villenage.

Examination of cases.

The first case on the subject is mentioned in Mr. Rushworth's Historical Collections (*k*); where it is said, that in the 11th year of Queen Elizabeth, one Cartwright brought a slave from Russia, and would scourge him; for which he was questioned; and it was resolved, that England was too pure an air for a slave to breathe in. In order to judge what degree of credit is due to the representation of this case, it will be proper to state from whom Mr. Rushworth reports it. In 1637, there was a proceeding by information in the Star-Chamber against the famous John Lilburne, for printing and publishing a libel (*l*); and for his contempt in refusing to answer interrogatories, he was by order of the court imprisoned till he should answer, and also whipped, pilloried, and fined. His imprisonment continued till 1640, when the Long Parliament began. He was then released, and the House of Commons impeached the judges of the Star-Chamber for their proceedings against Lilburne. In speaking to this impeachment, the managers of the Commons cited the case of the Russian slave. Therefore the truth of the case does not depend upon John Lilburne's assertion, as the learned observer on the ancient statutes seems to apprehend (*m*); but rests upon the credit due to the managers

(*k*) Vol. ii. p. 468.

(*l*) 3 St. Tr. 1315.

(*m*) Barr. Observ. on Anc. Stat.,
5th ed., 312.

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of the Commons. When this is considered, and that the year of the reign in which the case happened is mentioned, with the name of the person who brought the slave into England; that not above seventy-two or seventy-three years had intervened between the fact and the relation of it; and also that the case could not be supposed to have any influence on the fate of the impeachment against the judges; I see no great objection to a belief of the case. If the account of it is true, the plain inference from it is, that the slave was become free by his arrival in England. Any other construction renders the case unintelligible, because scourging, or even correction of a severer kind, was allowed by the law of England to the lord in the punishment of his villein; and consequently, if our law had recognised the Russian slave, his master would have been justified in scourging him (*n*).

In *Smith v. Browne* (*o*), the plaintiff declared for 20*l*. for a negro sold by him to the defendants in London, and on motion in arrest of judgment, the court held that the plaintiff should have averred in the declaration, that the negro at the time of the sale was in Virginia, and that negroes by the laws and statutes of Virginia are saleable. In these words there is a direct opinion against the slavery of negroes in England: for if it was lawful, the negro would have been saleable and transferable here, as well as in Virginia; and stating that the negro at the time of the sale was in Virginia, could not have been essential to the sufficiency of the declaration. But the influence of this case, on the question of slavery, is not by mere inference from the court's opinion on the plaintiff's mode of declaring in his action. The language of the judges, in giving that opinion, is remarkably strong against the slavery of

(*n*) Mr. Hargrave proceeds to comment on the following cases:—*Butts v. Penny*, 2 Lev. 201; S. C., 3 Keb. 785 (in which judgment does not seem to have been given); *Gelly v.*

Clerc, 1 Lord Raym. 147; *Smith v. Gould*, 2 Salk. 666; *Chamberlain v. Harvey*, 1 Lord Raym. 146; *Grantham's Case*, 3 Mod. 120.

(*o*) 2 Salk. 666.

negroes, and every other new slavery attempted to be introduced into England. Mr. Justice Powell says, "In a villein the owner has a property; the villein is an inheritance; but the law takes no notice of a negro." Lord Chief Justice Holt is still more explicit; for he says, that "one may be a villein in England;" but that "as soon as a negro comes into England, he becomes free." The words of these two great judges contain the whole of the proposition, for which I am contending. They admit property in the villein; they deny property in the negro. They assent to the old slavery of the villein; they disallow the new slavery of the negro.

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In *Shanley v. Hervey* (p), the question was between a negro and his former master, who claimed the benefit of a *donatio mortis causâ* made to the negro by a lady, on whom he had attended as servant for several years by the permission of his master. Lord Northington disallowed the master's claim, and gave the costs to the negro. He said, "As soon as a man sets his foot on English ground, he is free: a negro may maintain an action against his master for ill usage, and may have a *habeas corpus*, if restrained of his liberty."

Having observed upon cases, in which there is anything to be found relative to the present lawfulness of slavery in England, it is time to consider the force of the several objections, which are likely to be made, as well to the inferences I have drawn from the determined cases, as to the general doctrine I have been urging.

Objections
stated and
answered.

1. It may be asked, why it is that the law should permit the ancient slavery of the villein, and yet disallow a slavery of modern commencement?

To this I answer, that villenage sprung up amongst our ancestors in the early and barbarous state of society; that afterwards more humane customs and wiser opinions prevailed, and by their influence rules were established for

(p) 2 Eden, 126, commented on *per* Lord Stowell, 2 Hagg. Adm. R. 117.

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checking the progress of slavery ; and that it was thought most prudent to effect this great object, not instantaneously by declaring every slavery unlawful, but gradually by excluding a new race of slaves, and encouraging the voluntary emancipation of the ancient race. It might have seemed an arbitrary exertion of power, by a retrospective law to have annihilated property, which, however inconvenient, was already vested, under the sanction of existing laws, by lawful means ; but it was policy without injustice to restrain future acquisitions.

2. It may be said, that as there is nothing to hinder persons of free condition from becoming slaves by acknowledging themselves to be villeins, therefore a new slavery is not contrary to law.

The force of this objection arises from a supposition, that confession or acknowledgment of villenage is a legal mode of creating slavery ; but, on examining the nature of the acknowledgment, it will be evident, that the law does not permit villenage to be acknowledged for any such purpose. The term itself imports something widely different from creation ; the acknowledgment or confession of a thing, implying that the thing acknowledged or confessed has a previous existence ; and in all cases, criminal as well as civil, the law intends, that no man will confess an untruth to his own disadvantage, and therefore never requires proof of that which is admitted to be true by the person interested to deny it. Besides, it is not allowable to institute a proceeding for the avowed and direct purpose of acknowledging villenage ; for the law will not allow the confession of it to be received, except where villenage is alleged in an adverse way ; that is, only when villenage was pleaded by the lord against one whom he claimed as his villein (*q*), or by the villein against strangers, in order to excuse himself from defending actions to which his lord only was the

(*q*) Co. Litt. 121 b.

proper party ; or when one villein was produced to prove villenage against another of the same blood who denied the slavery. If the acknowledgment had been permitted as a creation of slavery, would the law have required that the confession should be made in a mode so indirect and circuitous as a suit professedly commenced for a different purpose ? If confession is a creation of slavery, it certainly must be deemed a creation by consent ; but if confession had been adopted as a voluntary creation of slavery, would the law have restrained the courts of justice from receiving confession, except in an adverse way ? If confession had been allowed as a mode of creating slavery, would the law have received the confession of one person as good evidence of slavery in another of the same blood, merely because they were descended from the same common ancestor ? This last circumstance is of itself decisive ; because it necessarily implied, that a slavery confessed was a slavery by descent.

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On a consideration of these circumstances attending the acknowledgment of villenage, I think it impossible to doubt its being merely a confession of that antiquity in the slavery, which was otherwise necessary to be proved. But if a doubt can be entertained, the opinions of the greatest lawyers may be produced to remove it, and to show, that, in consideration of law, the person confessing was a villein by descent and in blood (*r*).

3. It may be objected, that though it is not usual in the wars between Christian powers to enslave prisoners, yet some nations, particularly the several states on the coast of Barbary, still adhere to that inhuman practice ; that in case of our being at war with them, the law of nations would justify our king in retaliating ; and consequently, that the law of England has not excluded

(*r*) Yr. Bk. 43 Edw. 3, p. 4 ; *per* 732, pl. 6, 8 ; Fitzh. Abr. Villenage, Lord Hobart, Hob. 99 ; 2 Ro. Abr. 24.

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the possibility of introducing a new slavery, as the arguments against it suppose.

But this objection may be easily answered; for if the arguments against a new slavery in England are well founded they reach the king as well as his subjects. If it has been at all times the policy of the law of England not to recognise any slavery but the ancient one of the villein, which is now expired; we cannot consistently attribute to the executive power a prerogative of rendering that policy ineffectual. It is true, that the law of nations may give a right of retaliating on an enemy who enslaves his captives in war; but then the exercise of this right may be prevented or limited by the law of any particular country (s). I do not know an instance, in which a prerogative of having captive slaves in England has been assumed by the Crown; and it being also the policy of our law not to admit a new slavery, there appears neither reason nor fact to suppose the existence of a royal prerogative to introduce it.

4. Another objection will be, that there are English Acts of Parliament (t), which give a sanction to the slavery of negroes; and therefore that it is now lawful, whatever it might be antecedently to those statutes.

But the utmost which can be said of these statutes is, that they impliedly authorise the slavery of negroes in America; and it would be a strange thing to say, that permitting slavery there, includes a permission of slavery here. By an unhappy concurrence of circumstances, the slavery of negroes is thought to have become necessary in America; and therefore in America our legislature has permitted the slavery of negroes. But the slavery of negroes is unnecessary in England, and therefore the legislature has not extended the permission of it to

(s) Rutherf. Inst. Nat. L. vol. ii.
p. 576; Bynkershoek Quest. Jur.
Publ., lib. i. c. 3.

(t) Citing 5 Geo. 2, c. 7, s. 4; 32
Geo. 2, c. 31.

England ; and not having done so, how can this court be warranted to make such an extension ?

5. The slavery of negroes being admitted to be lawful now in America, however questionable its first introduction there might be, it may be urged, that the *lex loci* ought to prevail, and that the master's property in the negro as a slave, having had a lawful commencement in America, cannot be justly varied by bringing him into England.

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I shall answer this objection by explaining the limitation under which the *lex loci* ought always to be received. It is a general rule that the *lex loci* shall not prevail, if great inconveniences will ensue from giving effect to it (*u*). Now I apprehend that no instance can be mentioned, in which an application of the *lex loci* would be more inconvenient than in the case of slavery. It must be agreed, that where the *lex loci* cannot have effect without introducing the thing prohibited in a degree either as great, or nearly as great, as if there was no prohibition, there the greatest inconvenience would ensue from regarding the *lex loci*, and consequently it ought not to prevail. Indeed, by receiving it under such circumstances, the end of a prohibition would be frustrated, either entirely or in a very great degree ; and so the prohibition of things the most pernicious in their tendency would become vain and fruitless. And what greater inconveniences can we imagine, than those which would necessarily result from such an unlimited sacrifice of the municipal law to the law of a foreign country ? I will now apply this general doctrine to the particular case of our own law concerning slavery. Our law prohibits the commencement of domestic slavery in England ; because it disapproves of slavery, and considers its operation as dangerous and destructive to the whole community. But

(*u*) Vide cap. "*De conflictu legum diversarum in diversis imperiis*," Huber. Prælect., p. 538.

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would not this prohibition be wholly ineffectual, if slavery could be introduced from a foreign country? In the course of time, though perhaps in a progress less rapid, would not domestic slavery become as general, and be as completely revived in England by introduction from our colonies and from foreign countries, as if it was permitted to revive by commencement here; and would not the same inconveniences follow? To prevent the revival of domestic slavery effectually, its introduction must be resisted universally, without regard to the place of its commencement; and therefore, in the instance of slavery, the *lex loci* must yield to the municipal law. From the fact of there never yet having been any slavery in this country except the old and now expired one of villenage, it is evident that hitherto our law has uniformly controlled the *lex loci* in this respect; and so long as the same policy of excluding slavery is retained by the law of England, it must continue entitled to the same preference. Most of the other European states, in which slavery is dis-
countenanced, have adopted a like policy.

6. It may be contended, that though the law of England will not receive the negro as a slave, yet it may suspend the severe qualities of the slavery whilst the negro is in England, and preserve the master's right over him in the relation of a servant, either by presuming a contract for that purpose, or, without the aid of such a refinement, by compulsion of law, grounded on the condition of slavery in which the negro was previous to his arrival here.

But insuperable difficulties occur against qualifying the slavery by this artificial refinement. In the present case, at all events, such a modification cannot be allowable; because, in the return the master claims the benefit of the relation between him and the negro in the full extent of the original slavery. But, for the sake of showing the futility of the argument of modification, and in order to prevent a future attempt by the masters

of negroes to avail themselves of it, I will try its force.

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As to the presuming a contract of service against the negro, I ask at what time is its commencement to be supposed? If the time was before the negro's arrival in England, it was made when he was in a state of slavery, and consequently without the power of contracting. If the time presumed was subsequent, the presumption must begin the moment of the negro's arrival here, and consequently be founded on the mere fact of that arrival, and the consequential enfranchisement by operation of law. But is not a slavery, determined against the consent of the master, a strange foundation for presuming a contract between him and the slave? For a moment, however, I will allow the reasonableness of presuming such a contract, or I will suppose it to be reduced into writing; but then I ask, what are the terms of this contract? To answer the master's purpose, it must be a contract to serve the master here; and when he leaves this country to return with him into America, where the slavery will again attach upon the negro. In plain terms, it is a contract to go into slavery whenever the master's occasions shall require. Will the law of England disallow the introduction of slavery, and therefore emancipate the negro from it; and yet give effect to a contract founded solely upon slavery, in slavery ending? Is it possible that the law of England can be so insulting to the negro, so inconsistent with itself?

The argument of modification, independently of contract, is equally delusive. There is no known rule by which the court can guide itself in a partial reception of slavery. Besides, if the law of England would receive the slavery of the negro in any way, there can be no reason why it should not be admitted in the same degree as the slavery of the villein; but the argument of modification necessarily supposes the contrary; because, if the slavery of the negro was received in the same extent, then

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it would not be necessary to have recourse to a qualification. There is also one other reason still more repugnant to the idea of modifying the slavery. If the law of England would modify the slavery, it would certainly take away its most exceptionable qualities and leave those which are least oppressive. But the modification required will be insufficient for the master's purpose, unless the law leaves behind a quality the most exceptionable, odious, and oppressive; an arbitrary power of reviving the slavery in its full extent, by removal of the negro to a place in which the slavery will again attach upon him with all its original severity.

From this examination of the several objections in favour of slavery in England, I think myself well warranted to observe, that, instead of being weakened, the arguments against slavery in England have derived an additional force. The result is, not merely that negroes become free on being brought into this country, but that the law of England confers the gift of liberty entire and unincumbered; not in name only, but really and substantially; and consequently that Mr. Steuart cannot have the least right over Sommersett the negro, either in the open character of a slave, or in the disguised one of an ordinary servant.

2nd point -
as to the
right
claimed to
transport
slaves out
of England.

II. In the outset of the argument I made a second question on Mr. Steuart's authority to enforce his right, if he has any, by transporting the negro out of England. Few words will be necessary on this point, which my duty as counsel for the negro requires me to make, in order to give him every possible chance of a discharge from his confinement, and not from any doubt of success on the question of slavery.

If in England the negro continues a slave to Mr. Steuart, he must be content to have the negro subject to those limitations which the law of villenage imposed on the lord in the enjoyment of his property in the villein; there being no other laws to regulate slavery in this

country. But even those laws did not permit that high act of dominion which Mr. Steuart has exercised; for they restrained the lord from forcing the villein out of England. The law, by which the lord's power over his villein was thus limited, has reached the present times. It is a law made *temp.* William I., and the words of it are, *prohibemus ut nullus vendat hominem extra patriam* (x).

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If Mr. Steuart had claimed the negro as a servant by contract, and in his return to the *habeas corpus* had stated a written agreement to leave England when required signed by the negro, and made after his arrival in England, when he had a capacity of contracting, it might then have been a question, whether such a contract in writing would have warranted Mr. Steuart in compelling the performance of it, by forcibly transporting the negro out of this country? I am myself satisfied, that no contract, however solemnly entered into, would have justified such violence. It is contrary to the genius of the English law to allow any enforcement of agreements or contracts by any other compulsion than that from our courts of justice. The exercise of such a power is not lawful in cases of agreements for property; much less ought it to be so for enforcing agreements against the person. Besides, is it reasonable to suppose, that the law of England would permit that against the servant by contract, which is denied against the slave? Nor are great authorities wanting to acquit the law of England of such an inconsistency, and to show that a contract will not warrant a compulsion by imprisonment, much less by transporting the party out of this kingdom. Lord Hobart, whose extraordinary learning, judgment, and abilities,

(x) Wilk. Leg. Saxon. p. 229, et cap. 65, Leg. Gulielm. 1. This law furnishes another argument against slavery imported from a foreign country. If the law of Eng-

land did not disallow the admission of such a slavery, would it restrain the master from taking his slave out of the kingdom?

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have always ranked his opinion amongst the highest authorities of law, expressly says (y), that "the body of a freeman cannot be made subject to distress or imprisonment by contract, but only by judgment." There is, however, one case, in which it is said that the performance of a service to be done abroad may be compelled without the intervention of a court of justice: I mean the case of an infant apprentice, bound by proper indentures to a mariner or other person, where the nature of the service imports that it is to be done out of the kingdom, and the party, by reason of his infancy, is liable to a coercion not justifiable in ordinary cases (z). The Habeas Corpus Act (a) goes a step further; and persons who, by contract in writing, agree with a merchant or owner of a plantation, or any other person, to be transported beyond sea, and receive earnest on such agreements, are excepted from the benefit of that statute. I must say, that the exception appears very unguarded; and if the law, as it was previous to this statute, did entitle the subject to the *habeas corpus* in the case which the statute excepts, it can only operate in excluding him in that particular case from the additional provisions of the statute, and cannot, I presume, be justly extended to deprive him of the *habeas corpus* as the common law gave it before the making of the statute.

Conclusion.

Upon the whole, the return to the *habeas corpus* in the present case, in whatever way it is considered, whether by inquiry into the foundation of Mr. Steuart's right to the person and service of the negro, or by reference to the violent manner in which it has been attempted to enforce that right, will appear equally unworthy of this court's approbation. By condemning the return, the revival of domestic slavery will be rendered as impracticable by introduction from our colonies and from other countries,

(y) Hob. 61.

134.

(z) *Coventry v. Woodhall*, Hob.

(a) 31 Car. 2, c. 2, s. 13.

as it is by commencement here. Such a judgment will be no less conducive to the public advantage, than it will be conformable to natural justice, and to principles and authorities of law; and this court, by effectually obstructing the admission of the new slavery of negroes into England, will in these times reflect as much honour on themselves, as the great judges, their predecessors, formerly acquired, by contributing so uniformly and successfully to the suppression of the old slavery of villenage.

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The judgment of the court was delivered by Lord Mansfield, C.J., after some delay, and with evident reluctance (*b*), as follows:—The only question before us is, whether the cause on the return is sufficient? If it is, the negro must be remanded; if it is not, he must be discharged. The return states, that the slave departed and refused to serve; whereupon he was kept, to be sold abroad. So high an act of dominion must be recognised by the law of the country where it is used. The power of the master over his slave has been extremely different, in different countries. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, are erased from memory. It is so odious that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.

The Judg-
ment.

Mr. Hargrave's argument in *Sommersett's case* established incontrovertibly these propositions:—1st. That the

NOTE TO
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(*b*) See 20 St. Tr. 79; 1 Evans, Lord Stowell, 2 Hagg. Adm. R. 105, Decis. of Lord Mansfield, 95; *per* 110.

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Propositions
established
in above
case ;

law of England never recognised any species of domestic slavery, except the ancient one of villenage, long since expired. 2ndly. That it has sufficiently provided against the introduction of a new slavery, under the name of villenage, or any other denomination whatsoever. 3rdly (as a corollary from the preceding). That the owner of a slave has no authority or control over him in England, nor any right forcibly to remove him out of the country. And thus fell, without opposition by the public, a system sanctioned by high legal opinion, and affirmed by enduring practice (*c*). It fell, never to revive. And the spirit of Lord Mansfield's judgment having been gradually instilled into the legislature, induced the enacting of successive measures (*d*), which entirely abrogated slavery in our West India dependencies, made the dealing in slaves illegal, and provided for the manumission of the then existing slaves. Great Britain has indeed, since her own abandonment of the slave trade, deemed it "repugnant to the law of nations, to justice, and humanity, though without presuming so to consider and treat it where it occurs in the practice of the subjects of a state which continues to tolerate and protect it by its own municipal

(*c*) See *per* Lord Stowell, 2 Hagg. Adm. R. 105, who observes that "The personal traffic in slaves resident in England had been as public and as authorised in London as in any of our West India Islands." "Such a state of things continued without impeachment from a very early period up to nearly the end of the last century."

(*d*) The first Act prohibiting the importation of slaves by subjects of this Crown into a foreign country was passed in 1806 (46 Geo. 3, c. 52).

The first general Act which pro-

hibited slave-trading received the royal assent, March 25, 1807 (47 Geo. 3, sess. 1, c. 36), and in 1811 slave-trading was made felony by the stat. 51 Geo. 3, c. 23.

The following are some of the leading statutes now operative with regard to slavery:—Part of 5 Geo. 4, c. 113 (see *Hocquard v. Reg.*, 11 Moo. P. C. C. 155; *Reg. v. Serva*, 1 Den. C. C. 104); 16 & 17 Vict. c. 86; 36 & 37 Vict. cc. 59 & 88; 39 & 40 Vict. c. 46; 42 & 43 Vict. c. 38.

regulations," though the law "puts upon the parties who are found in the occupation of that trade, the burthen of showing that it was so tolerated and protected" (e). NOTE TO
SOMMER-
SETT'S CASE.

From a decision so celebrated as that in *Sommersett's Case*, let us not draw too hasty a conclusion—the doctrine settled by it is to be accepted with limitation. In the case of *The Slave Grace* (f) the question was raised before Lord Stowell, whether a slave who had been in England with her mistress, and had thence voluntarily returned to a West India island, where slavery was legal, became wholly enfranchised by her residence in England? Did she thus acquire the *status* of a free person, and become entitled to be so considered in the colony? Lord Stowell determined these questions in the negative, distinguishing between the absolute title to freedom conferred by manumission (g), and that qualified right to it resulting from mere residence in England, of which the slave may avail himself for repudiating the authority of his master, and asserting his freedom from control. Should he, however, omit to do so,—should he, having *ad interim* continued to perform his accustomed services, voluntarily return to the colony or place where slavery is allowed, the *status* of —how
qualified.

*The Slave
Grace.*

(e) Judgment, *The Fortuna*, 1 Dods. Adm. R. 85; *The Marianna*, Id. 91; *The Diana*, Id. 95—99.

(f) 2 Hagg. Adm. R. 94.

(g) "*Manumittere*" est de manu, id est, potestate dimittere seu potestate liberare et dimittere. Brissonius ad verb.

Manumission confers an absolute title to freedom, good against all the world, whereas the right to freedom resulting from mere residence in England endures so long only as that

residence continues, expires when it ceases, and on reimportation into a slave colony revives. See Judgm., 2 Hagg. Adm. R. 100.

"Herein," says Lord Coke, "the common law differeth from the civil law, for *libertinum ingratum leges civiles in pristinam redigunt servitutem, sed leges Angliæ semel manumissum semper liberum judicant gratum et ingratum.*" Co. Litt. 137, b.

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SOMMER-
SETT'S CASE.

*The Slave
Grace.*

slave will still attach to him, and the master's right to his service will be resumed.

The precise facts in *The Slave Grace* (h) were as follows :—In the year 1822, Mrs. Allan, of Antigua, came to England, bringing with her a female attendant, Grace, by birth and servitude a domestic slave (i). Grace resided with her mistress in this country until 1823, when she voluntarily returned with her mistress to Antigua, and there continued with her mistress, still in the capacity of a domestic slave. An information was afterwards filed by the collector of customs at Antigua, charging a non-compliance with the regulations imposed by stat. 59 Geo. 3, c. 120, ss. 11, 12, upon the importation and exportation of slaves to and from the West India colonies, and claiming the slave Grace as consequently forfeited to the Crown, on suggestion of having been illegally imported in 1823. These clauses of the statute, however, were held by Lord Stowell to be inapplicable to the transit of slaves to or from England and its colonies.

The 5th count of the information proceeded on a broader ground, and charged that the said Grace, “being a free subject of his Majesty, was unlawfully imported as a slave from Great Britain into Antigua, and there illegally held and detained in slavery contrary to the form of the statute in such case made and provided.” The great question here raised was therefore as above mentioned,

(h) 2 Hagg. Adm. R. 94.

(i) “Slaves themselves possess rights and privileges in one character which they are not entitled to in another. The domestic slave may, in that character, by law accompany his master or mistress to any part of the world; but that privilege exists no

longer than his character of domestic slave attaches to him; for should the owner deprive him of the character of being a domestic slave, by employing him as a field slave, he would be deprived of the right of accompanying his master out of the colony.” Judgm., 2 Hagg. Adm. R. 114.

did a slave who had been in England, and had on any pretence returned thence to a West India colony, become by such residence enfranchised? Lord Stowell, after reviewing prior decisions (*k*), deduced from them merely this, that "slaves coming into England are free *there*," and that "they cannot be sent out of the country by any process to be there executed" (*l*). In the celebrated case of *Dred Scott* (*m*), decided by the Supreme Court of the United States of America, the point adjudged by Lord Stowell in *The Slave Grace* came under consideration. There, a person having the *status* of slave in a state where slavery was legal, was taken by his master into a free state of the Union in which slavery was prohibited by law; nothing, however, was there effectually done to alter the condition of the slave, and it was held that on returning to a slave state he again became a slave.

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SETT'S CASE.

Scott v.
Sandford.

The decision in the above case has indeed been canvassed, on the ground that municipal law recognises no intermediate condition between freedom and slavery, and as slavery consists in subjection to the dominion of a master, it is hard to see how that dominion can be taken away, and yet the state of slavery continue. This objection, however specious, may be answered in the very words of Lord Stowell (*n*). "The entire change of the legal character of individuals produced by the change of local situation is far from being a novelty in the law. A residence in a new country often introduces a change of legal condition which imposes rights and obligations

(*k*) Of which see particularly *Williams v. Brown*, 3 B. & P. 69, 71.

(*l*) *Judgm.*, 2 Hagg. Adm. R. 118.

(*m*) *Scott v. Sandford*, 19 Howard (U.S.), R. 393. See also *The Ante-*

lope, 10 Wheaton, Sup. Ct. R. 66; *Osborn v. Nicholson*, 13 Wallace, Sup. Ct. R. 654.

(*n*) 2 Hagg. Adm. R. 113, 114.

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totally inconsistent with the former rights and obligations of the same persons. Persons bound by particular contracts which restrain their liberty, debtors, apprentices, and others, lose their character and condition for the time, when they reside in another country, and are entitled as persons totally free, though they return to their original servitude and obligations upon coming back to the country they had quitted." In further answer to such reasoning, a case of this kind might be suggested—a foreigner, resident in his own country, there becomes bankrupt, the condition of bankruptcy, according to the law of that country, entitling any creditor to coerce the bankrupt, and in a summary way to restrain his liberty; the bankrupt then proceeds to this country, and whilst here, his liberty being thus interfered with, will, according to the law of this realm, be entitled to his writ of *habeas corpus*, or other suitable protection, yet, on returning to his own country, the *status* of bankrupt with all its incidents will re-attach. The operation of incidents to a certain *status* may be suspended without being necessarily nullified or destroyed.

The weight of authority being in favour of Lord Stowell's judgment in *The Slave Grace* (o), we must not be shaken in our adhesion to it by remarks of other equally learned persons, which though, perhaps, at first sight repugnant to it, on closer examination will turn out not to be so.

Fenton v.
Livingstone.

In *Fenton v. Livingstone* (p) the question was as to the validity of a marriage between a widower and his deceased

(o) See Story, *Confl. Laws*, 7th ed. s. 96, a.; *Life of Judge Story*, pp. 552, 558, cited 19 Howard (U.S.), R. 467; Report of Commis-

sion on Fugitive Slaves, 1876, p. xlviii.

(p) 3 Macq. Scotch App. Cas. 497, 538.

wife's sister (q), and Lord Brougham adverts to the doctrine that *status* acquired in one country follows a person everywhere—*sicut umbra personam sequitur*; and then observes that “nothing can be more a case of *status* than liberty and slavery. Yet, when a man from a country where he was by law held in slavery comes to England or Scotland, the light of liberty chases away the shadow. He is, in all respects, free as regards his person and as regards his property, though, in the place he came from, he was a mere chattel, and whatever he earned or became possessed of in any way while there, belonged to his master, that master could not recover it in our courts since the principles which were laid down in *Sommersett's Case* in England, and in *Knight v. Wedderburn* (r) somewhat earlier in Scotland.” And, again,—the rule, says Littledale, J. (s), “that a personal *status* accompanies a man everywhere is admitted to have this qualification, that it does not militate against the law of the country where the consequences of that *status* are sought to be enforced.” Clearly these remarks, if read apart from the context, and without special reference to the facts which called them forth, might seem to be incompatible with what Lord Stowell held. They were, however, introduced into judgments upon facts which had no relation to slavery, and were meant to embody and put forward the general doctrine merely—without its qualification—that slavery is a condition which adheres to, and follows everywhere, him who has become clothed with it, save only should he be brought within the influence of some muni-

(q) *Ante*, p. 46.(r) Morison, Dict. of Decis. 14545, cited *per* Lord Stowell, 2 Hagg. Adm. R. 118.(s) *Doe d. Birtwhistle v. Vardill*, 5 B. & C. 455; S. C., 2 Cl. & F. 571; 7 *Id.* 895.

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SETT'S CASE.

Rights of
persons on
board
British
man-of-war.

*Forbes v.
Cochrane.*

cipal law which, when called into active operation, declares that *status* to be illegal.

The rights of a subject of this Crown, or of a foreigner, on board a British man-of-war, have been very definitely laid down ; the ship is to be regarded as a floating island under the dominion of the British Crown, and subject to the laws of England. Now, let us suppose that a person, in a state of slavery, within a foreign country where slavery is tolerated, thence escapes, and takes refuge on board a British man-of-war, what effect would this change of locality have upon his *status* ? Such, indeed, were the facts (briefly stated) which appeared in *Forbes v. Cochrane* (t), and the question suggested may be resolved according to the method there adopted by Holroyd, J. : “ Put,” he says, “ the case of an uninhabited island discovered and colonised by the subjects of this country—the inhabitants would be protected and governed by the laws of this country. In the case of a conquered country, indeed, the old laws would prevail until altered by the king in council ; but, in the case of the newly discovered country, freedom would be as much the inheritance of the inhabitants and their children as if they were treading on the soil of England (u). Now, suppose that a person, who had been a slave in one of our own West India settlements, escaped to such a country, he would thereby become as much a freeman as if he had come into England. He ceases to be a slave in England only because there is no law which sanctions his detention in slavery—for the same reason he would cease to be a slave the moment he landed in the supposed newly discovered island. In this case, indeed, the fugitives did not escape to any island belong-

(t) 2 B. & C. 448.

(u) *Ante*, p. 52.

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ing to England ; but they went on board an English ship, which, for this purpose, may be considered a floating island, and in that ship they became subject to the English laws alone"(x). In *Forbes v. Cochrane* the action was at suit of the owner of a slave, the plaintiff being a British subject, against the commanding officers on the station at which the occurrence complained of took place, for harbouring the slave; but it was held not to be maintainable, in virtue of the rule which has been just stated, and because there was no evidence of any wrongful act done by the defendants towards the plaintiff—nay, even if there had been, it might well be questioned whether any action could have been maintained against them by reason of their position as officers, acting in the discharge of a public duty in a place *flagrante bello* (y).

In *Forbes v. Cochrane* broad views were developed by the court in regard to the illegality of slavery as opposed to the law of nature generally, to the law of England in particular, and as unfit to be here recognised in virtue of the comity of nations. "The proceedings in our courts," said Best, J. (z), "are founded upon the law of England, and that law is again founded upon the law of nature and the revealed law of God. If the right sought to be enforced is inconsistent with either of these the English municipal courts cannot recognise it." This *dictum* of Best, J., must, of course, be understood as having special reference to the facts upon which his judgment was pronounced ; and the reasoning of Mr. Justice Holroyd, above cited, shows conclusively that, under cir-

(x) See *Reg. v. Lesley*, Bell, C. C. 220, cited *ante*, p. 39 ; *per* Lord Stowell, 2 Hagg. Adm. R. 123. As to how far the doctrine *supra* is applic-

able to merchant ships, see *per* Lindley, J., *Reg. v. Keyn*, 2 Ex. D. 93-96.

(y) *Post*, Part II.

(z) 2 B. & C. 471.

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cumstances such as there appeared, the law of this country must prevail against any local law, to the benefit of which the plaintiff might assert his claim, for "the law of slavery is a law *in invitum*, and when a party gets out of the territory where it prevails, and out of the power of his master, and gets under the protection of another power without any wrongful act done by the party giving that protection, the right of the master, which is founded on the municipal law of the particular place only, does not continue, and there is no right of action against a party who merely receives the slave in that country without doing any wrongful act."

Slave trade
— not piracy
jure gentium.

But although the proceedings in our courts are founded upon the law of England, and that law is in part founded upon the law of Nature and the law of God, it may not thence necessarily follow that our courts will decline to entertain any suit involving a claim to property in slaves, or to the right of dominion over them. In *The Case of Le Louis* (a), Lord Stowell laid down, *inter alia*, the proposition, which has since been recognised, that "trading in slaves is not a crime by the law of nations," neither are those who carry it on to be deemed *humani generis hostes* (b). In *Buron v. Denman* (c), a plaintiff resident in a country where it was lawful to possess slaves was held entitled to sue in trespass in this country the captain of an English man-of-war for wrongfully taking them away, the alleged wrongful act having been done abroad; and in *Santos v. Illidge* (d), a majority of the

Le Louis

*Buron v.
Denman*.

*Santos v.
Illidge*.

(a) 2 Dods. Adm. R. 210, 246, 248; *per* Parke, B., 2 Exch. 186, 187; Arg., *Reg. v. Serra*, 1 Den. C. C. 132 *et seq.*; *Madrado v. Willes*, 3 B. & Ald. 353.

(b) Slave-trading is piracy by our

statute law. See 5 Geo. 4, c. 113, s. 9; 7 Will. 4 & 1 Vict. c. 97, s. 1.

(c) 2 Exch. 167.

(d) 8 C. B., N. S. 861, reversing judgment in C. P., 6 *Id.*, 841; and 29 L. J., C. P. 348.

Court of Exchequer Chamber, contrary to the view expressed by the Court of Common Pleas, upheld as valid a contract for the sale of slaves in Brazil, the vendors being British subjects domiciled in this country, and the purchaser being a native of Brazil (e). An examination of these cases may enable us to qualify and assign its true meaning to the language of Best, J., in *Forbes v. Cochrane*; such decisions in no way, however, militate with the leading proposition deducible from Mr. Hargrave's argument in *Sommersett's Case*, that a state of slavery in this country is incompatible with our law—that the freedom of the subject is guaranteed and protected by the Crown (f).

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Doubtless in some early periods of our history, the course of legislation in regard to the poor and labouring classes tended towards the introduction amongst us of a kind of servitude scarcely, if at all, less onerous than villenage (g). And although the genius of English law

Servitude
by contract
for life.

(e) The weight of judicial authority seems, however, to be in favour of affixing to the stat. 5 Geo. 4, c. 113, this meaning, that it prohibits the trade in slaves "by all persons within the control of the legislature, including British subjects all over the world." Judgm., 6 C. B., N. S. 862. *Reg. v. Zulueta*, 1 Car. & K. 215 (published separately, A.D. 1844, from the shorthand writer's notes).

(f) The question of how far officers commanding English ships of war, when in the territorial waters of states where slavery is legal, are bound by International Law to recognise the rights of owners, has, within recent years, received much discussion. See Report of Commission on Fugitive Slaves, 1875. Phillimore, Int. Law, vol. i. pp. 436—442, 3rd

ed. Sir J. Stephen (Hist. Cr. Law, vol. ii. pp. 50—56), after an elaborate examination of the authorities, states his opinion to be that such officers "are under an obligation imposed by International Law to deliver up fugitive slaves who have taken refuge on board their ships when required to do so by the local authorities in accordance with the local law. That the law of England does not forbid them to discharge this obligation. And that it is doubtful whether by refusing to discharge it they might not incur responsibility to the owner of the slave." As to the immunity of an officer acting under the instructions of his own Government, see *post*, Part II.

(g) See particularly the Statute of Labourers (23 Edw. 3, c. 1) which

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and the spirit of the English Constitution are alike opposed to the placing of undue restraint on personal liberty—wherefore that portion of Mr. Hargrave's reasoning in the principal case (*h*), which asserts the illegality of enforcing a contract by violence, may be accepted as correct—we should not be justified in inferring that a contract to serve for life must necessarily be invalid.

Wallis v. Day (*i*) was an action of covenant on an indenture, by which it appeared that, the plaintiff having been a carrier between London and Wisbeach, the defendants had contracted with him to purchase the goodwill of his business, and to take him into their service at a weekly salary; the plaintiff covenanting with the defendants to refrain from carrying on the business of a carrier during his life, except as in the indenture mentioned, and during his life “well and faithfully to serve” the defendants. The legality of this latter covenant was affirmed by the Court of Exchequer; Lord Abinger, C.B., observing that “the defendants might have maintained an action against the plaintiff for not rendering them the services he covenanted to perform, there being nothing illegal in that part of the contract. It was urged, however, that as the contract is to serve for life, it is illegal. There is no authority for that position, and I know of no principle that makes it so.” “The rule of law is, that a contract in general restraint of trade is void, as being

rendered service compulsory on the poor and needy. This statute was repealed by 5 Eliz. c. 4. As to its provisions *vide per* Wightman, J., *Lumley v. Gye*, 2 E. & B. 241; *per* Coleridge, J., *Id.* 260 *et seq.*; 2 Reeves, Hist. Eng. Law, 272 (Ed. 1869).

See also stat. 1 Edw. 6, c. 3; Pashley on Pauperism and Poor Laws, 183; 3 Reeves, Hist. Eng. Law, 451.

(*h*) *Ante*, p. 97; Judgm. *Leonard Watson's Case*, 9 Ad. & E. 783.

(*i*) 2 M. & W. 273. But see *per* Lord Alvanley, C.J., *Williams v. Brown*, 3 B. & P. 70.

against the policy of the law, but if the contract is made on sufficient consideration, and the public gain some advantage, it will be good. Suppose a man engaged in trade is desirous, when old age approaches, of selling the goodwill of his business, why may he not bind himself to enter the service of another, and to trade no more on his own account? So long as he is able he is bound to render his services, and it cannot be said to be a contract in absolute restraint of trade, when he contracts to serve another for his life in the same trade" (*k*).

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There yet remains for consideration one species of compulsory servitude, the legality of which rests on an intelligible principle, and depends on our customary law. The famous 29th chapter of Magna Charta declares that no freeman shall be disseised of his liberties or exiled but by lawful judgment of his peers or by the law of the land, and commenting upon these words Lord Coke tells us (*l*) "that this is a beneficial law and is construed benignly, and therefore the king cannot send any subject of England against his will to serve him out of this realm." If, observes Mr. Emlyn (*m*), this still be law, that "a subject shall not be compelled to serve the king out of the realm, how comes it to pass that divers subjects (not only mariners but others) have been taken up by virtue of press-warrants, and by force put aboard ship and carried beyond sea?" Certainly it would be difficult to conceive a more startling infraction than this of the liberty of the subject, and although our common law, to which that liberty is so dear, itself, in this particular, sanctioned

(*k*) Notwithstanding a *dictum* of Lord Abinger in the above case, it does not seem that a contract to serve for life need be under seal. See 1 Smith, L. C., 8th ed. 443; and Pollock on Contract, ch. vi.
(*l*) 2 Inst. 47.
(*m*) 1 St. Tr., Pref. xxvii.

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the invasion of it (*n*), it may be confidently predicted that the system will not again be enforced (*o*).

With regard to the legality of pressing seamen, is to be found an elaborate argument by Sir Michael Foster, who, in his capacity of Recorder of Bristol, presided at the trial for murder of one Broadfoot, A.D. 1743 (*p*). The evidence in this case showed that homicide had been committed by the prisoner upon one of a press-gang whilst engaged in pressing seamen under a legal warrant, which was executed in an illegal manner. A verdict of manslaughter was returned under direction of the judge, on the ground of the irregularity adverted to, which, in contemplation of law, reduced the offence charged from the higher to the lower grade—from murder to manslaughter. The question, he said, is whether persons who have freely chosen a seafaring life can be legally pressed into the service of the Crown, whenever the public safety requires it *ne quid detrimenti respublica capiat*? And this question Sir M. Foster answered in the affirmative. The right to press for the naval service stands, he pointed out, on the same footing as the right which the Crown has to require the personal service of every man able to bear arms in case of a sudden invasion or insurrection, a right recognised in various ancient statutes, and depending on necessity and the principle of self-preservation. So the right of pressing seamen for the public service is a prerogative inherent in the Crown, grounded upon common law, and recognised by many Acts of Parliament. “The rights of the Crown, and the liberties of the subject too, stand

(*n*) Gude, Cr. Pr. 282. Maude & Pollock on Merch. Shipping, vol. i. p. 167 (2nd ed.).

(*o*) See Report of the Commission

on the Navy, 1859.

(*p*) 18 St. Tr. 1323; Fost. Cr. L. 178.

principally upon the foot of common law, though both have been in many cases confirmed, explained, or ascertained by particular statutes." So in *Rex v. Tubbs* (q) Lord Mansfield observed, "The practice of pressing is deduced from that trite maxim of the constitutional law of England, that 'private mischief had better be submitted to than that public detriment and inconvenience should ensue'" (r).

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In *Ex parte Fox* (s) Lord Kenyon, C. J., had to adjudicate on a rule obtained to show cause why Fox should not be brought up by *habeas corpus*, in order that he might be discharged out of custody of a press-gang, on an affidavit stating that he was *headborough* (t) of the place at which he was resident when impressed—it appeared, however, that he was a seafaring man, and the Chief Justice discharged the rule, for "the right of pressing is founded on the common law, and extends to all persons exercising similar employments with the defendant. Any exemptions which such persons may claim, must depend upon the positive provisions of statutes," and Buller, J., remarked that, "the only excepted case in the books which does not rest on the statute law, is that of a ferryman, who, it is said in one old case, is exempted from being impressed" (u).

(q) Cowp. 512.

(r) *Salus populi suprema lex*. Leg. Max., 6th ed. 1. "Private mischiefs must be borne with patience for preventing a national calamity." Per Sir M. Foster, 18 St. Tr. 1330.

(s) 5 St. Tr. 276.

(t) *i.e.*, a kind of constable; vide Jacob, Law Dict., *ad verb.*; 1 Steph. Com. 123.

(u) *Goldswain's Case*, 2 W. Bla.

1207; 1 Gude, Cr. Pr. 283; 18 St. Tr. 1359. *Ex parte Boggin*, 13 East, 549. The impressment of men for the army was declared to be illegal by an Act of the Long Parliament (16 Car. 1, c. 28), "except in cases of necessity of the sudden coming in of strange enemies into the kingdom"; the practice has however sometimes been authorised by Parliament in time of war, see Stat. 19 Geo. 3, c. 10.

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SETT'S CASE.
—
Penal servi-
tude.

Punishment is inflicted on a criminal in order that others may, by his example, be deterred from offending in like manner; penal servitude, even for life, may reasonably be imposed as a penalty for heinous crimes, in order that the person suffering it may thus be deprived of the power to do future mischief (*x*). The merest allusion to this species of slavery will here suffice. Its existence in no way impugns the dogma, *Lex Angliæ est lex misericordiæ—libertati favet* (*y*). Such restraint is imposed on that man only who has abused the right to liberty originally vested in him, for *libertas naturalis est facultas ejus quod cuique facere libet NISI QUOD JURE PROHIBETUR* (*z*).

(*x*) 1 Steph. Com. 147.

Distinguishing between imprisonment which precedes trial and that which is inflicted as a punishment, Archbishop Whately well observes that "when a man is committed to prison for trial every comfort and indulgence consistent with his safe custody ought to be allowed him.

But when imprisonment is the allotted *punishment* to a criminal, it is plain that it ought to be a punishment." Thoughts on Secondary Punishments, 12; Beccaria on Crimes, chap. 29.

(*y*) 2 Inst. 315.

(*z*) Bracton, lib. i. c. 6, s. 2; Co. Litt. 116, b.

BUSHELL'S CASE, Vaughan, R. 135; 6 St. Tr. 999 (a).

(22 Car. 2, A.D. 1670.)

TRIAL BY JURY—IMMUNITY OF JURORS HOW ASSURED.

A jury cannot lawfully be punished by fine, imprisonment, or otherwise, for finding against the evidence, or against the direction of the judge.

From amongst the Nonconformists affected in the early part of the reign of Charles II. by the Act of Uniformity (b), by the Five Mile Act (c), and the Conventicle Acts (d), the Quakers especially, by the firmness of their opposition to those measures, attracted persecution. "They met," says the historian of the Puritans (e), "at the same place and hour as in times of liberty, and when the officers came to seize them, none of them would stir; they went all together to prison, they stayed there till they were dismissed, for they would not petition to be set at liberty, nor pay the fines set upon them, nor so much as the gaol fees. When they were discharged they went to their meeting-house again as before, and when the doors were shut up by order, they assembled in great numbers in the street before the doors, saying they would not be ashamed nor afraid to disown their meeting together in a peaceable manner to worship God." On the 1st September, 1670, two of the principal speakers belonging to this denomination, the celebrated William Penn and William Mead, were tried for a breach of law, in having preached to a large assemblage of people in Gracechurch Street (f). The jury,

(a) S. C., Freeman, 1; 2 Jones, 2, c. 4; revised by stat. 22 Car. 2, c. 1.

(b) 13 & 14 Car. 2, c. 4.

(c) 17 Car. 2, c. 2; 2 Rapin, Hist. Eng. 641, ed. 1733.

(d) "An Act to prevent and suppress seditious conventicles," 16 Car.

(e) Neal, History of the Puritans, vol. iii. p. 432.

(f) *Trial of Penn and Mead*, 6 St. Tr. 951.

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CASE,
—

of whom Bushell was one, having, on the trial, in spite of many threats and much brow-beating from the court, acquitted the prisoners, were by the Recorder fined in the sum of forty marks each for their contempt in doing so, and were committed to prison in default of payment.

Writ of
habeas
corpus.

Whereupon the king's writ of *habeas corpus*, dated the 9th November of the year aforesaid, issued out of the Court of Common Pleas, directed to the sheriffs of London to have the body of Edward Bushell, by them detained in prison, together with the day and cause of his caption and detention, on —, before the court, to do and receive as the court should consider ; as also to have then the said writ in court.

Return.

To which writ the sheriffs returned:—That at the king's court of a session of oyer and terminer, held for the city of London in the Old Bailey, on Wednesday the 31st August, 22 Car. II., before the Mayor of London and divers of his Majesty's justices, Edward Bushell, the prisoner at the bar, was committed to the gaol of Newgate, to be there safely kept in custody of the sheriffs of the said city, by virtue of a certain order made by the said Court of Sessions as follows:—

It is ordered by the court here that a fine of forty marks be severally imposed upon Edward Bushell and other eleven persons named, being the twelve jurors sworn and charged to try several issues joined between our lord the king, and William Penn and William Mead, for certain trespasses, contempts, unlawful assemblies, and tumults, made and perpetrated by the said Penn and Mead, together with divers other unknown persons, to the number of three hundred, unlawfully and tumultuously assembled in Gracechurch Street in London, to the disturbance of the peace, whereof the said Penn and Mead were then indicted before the said justices ; upon which indictment the said Penn and Mead pleaded they were Not Guilty:— For that they, the said jurors, the said William Penn and William Mead, of the said trespasses, contempts, unlawful

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assemblies, and tumults, *contra legem hujus regni Angliæ, et contra plenam et manifestam evidentiam, et contra directionem curiæ in materiâ legis, hic, de et super præmissis eisdem juratoribus versus præfatos Will. Penn et Will. Mead, in curiâ hic apertâ datam, et declaratam de præmissis iis impositis in indictamento prædicto, acquietaverunt, in contemptum domini regis nunc, legumque suarum, et ad magnum impedimentum et obstructionem justitiæ, necnon ad malum exemplum omnium aliorum juratorum in consimili casu delinquentium.* And thereupon it is further ordered by the court, that the said Edward Bushell be taken and committed to the gaol of our lord the king of Newgate, there to remain until he do pay forty marks for his fine aforesaid, or be delivered by due course of law, &c. And because the said Edward has not yet paid to our said lord the king the said fine of forty marks, we, the now sheriffs, the body of the said Edward in the gaol aforesaid have until now detained. And this is the cause of the caption and detention of the said Edward, whose body we have now ready before the said justices.

The judgment of the court upon the above return was Judgment. delivered by Vaughan, C. J., as under:—

The writ of *habeas corpus* is now the most usual remedy by which a man is restored again to his liberty, if he have been against law deprived of it.

Therefore the writ commands the day, and the cause of the caption and detaining of the prisoner to be certified upon the return, which, if not done, the court cannot possibly judge whether the cause of the commitment and detainer be according to law or against it.

Therefore the cause of the imprisonment ought, by the return, to appear as specifically and certainly to the judges of the return, as it did appear to the court or person authorised to commit; else the return is insufficient, and the consequence must be:—That either the prisoner, because the cause returned of his imprisonment, Return
should be
certain.

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is too general, must be discharged; when, if the cause had been more particularly returned, he ought to have been remanded; or else he must be remanded, when, if the cause had been particularly returned, he ought to have been discharged. Both which are inconveniences not agreeing with the dignity of the law.

In the present case it is returned, That the prisoner, being a jurymen among others charged at the Sessions Court of the Old Bailey to try the issue between the king and Penn and Mead, upon an indictment, for assembling unlawfully and tumultuously, did *contra plenam et manifestam evidenciam*, openly given in court, acquit the prisoner indicted, in contempt of the king, &c.

The court hath no knowledge by this return, whether the evidence given were full and manifest, or doubtful, lame, and dark, or indeed evidence at all material to the issue, because it is not returned what evidence in particular, and as it was delivered, was given. For it is not possible to judge of that rightly, which is not exposed to a man's judgment. But here the evidence given to the jury is not exposed at all to this court, but the judgment of the Court of Sessions upon that evidence is only exposed to us; who tell us it was full and manifest. But our judgment ought to be grounded upon our own inferences and understandings, and not upon theirs.

It was said by a learned judge,—If the jury might be fined for finding against manifest evidence, the return was good, though it did not express what the evidence particularly was, whereby the court might judge of it, because returning all the evidence would be too long. A strange reason: for if the law allow me remedy for wrong imprisonment, and that must be by judging whether the cause of it were good, or not, to say the cause is too long to be made known, is to say the law gives a remedy which it will not let me have, for I must be wrongfully imprisoned still, because it is too long to know that I ought to be freed? What is necessary to an end, the law

allows it never too long. *Non sunt longa quibus nihil est quod demere possis*, is as true as any axiom in Euclid. Besides, one manifest evidence returned had sufficed, without returning all the evidence. But the other judges were not of his mind.

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Suppose the return had been, that the jurors were committed by an order of the Court of Sessions, because they did, *minus juste*, acquit the persons indicted; or because they did, *contra legem*, acquit the persons indicted; or because they did, *contra sacramentum suum*, acquit them. The judges cannot upon the present more judge of the legal cause of their commitment, than they could if any of these causes, as general as they are, had been returned for the cause of their commitment. And the same argument may be exactly made to justify any of these returns, had they been made, as to justify the present return, they being equally as legal, equally as certain, and equally as far from possessing the court with the truth of the cause: and in what condition should all men be for the just liberty of their persons, if such causes should be admitted sufficient causes to remand persons to prison?

To objections made by the prisoners' counsel against the return, as too general, it hath been said:—

1. That *institutum est quod non inquiratur de discretione judicis* (g).

2. That the Court of Sessions in London is not to be looked on as an inferior court, having all the judges commissioners. That the court, having heard the evidence, it must be credited that the evidence given to the jury of the fact was clear, and not to be doubted.

As for any such institution pretended, I know no such, nor believe any such, as it was applied to the present cause; but taking it in another, and in the true sense, I admit it for truth: that is, when the king hath constituted

(g) See the maxim, *De fide et sive facti*. Leg. Max., 6th ed. 80. *officio judicis non recipitur quaestio*, And note to *Kemp v. Neville*, post. *sed de scientiâ sive sit error juris*

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a man a judge under him, his ability, parts, fitness for his place, are not to be reflected on, censured, defamed, or vilified by any other person, being allowed and stamped with the king's approbation, to whom only it belongs to judge of the fitness of his ministers.

And such scandalous assertions or inquiries upon the judges of both benches, is forbidden by the statute of *Scandalum Magnatum* (*h*). Nor must we, upon supposition only, either admit judges deficient in their office, for so they should never do anything right; nor, on the other side, must we admit them unerring in their places, for so they should never do anything wrong.

And in that sense the saying concerns not the present case.

Remedy
where
judgment
erroneous.

But if any man thinks that a person concerned in interest, by the judgment, action, or authority exercised upon his person or fortunes by a judge, must submit in all, or any of these, to the implied discretion and unerringness of his judge, without seeking such redress as the law allows him, it is a persuasion against common reason, the received law, and usage both of this kingdom, and almost all others.

If a court, inferior or superior, has given a false or erroneous judgment, is anything more frequent than to reverse such judgment, by writ of false judgment, of error, or appeal, according to the course of the kingdom?

If they have given corrupt and dishonest judgments, they have in all ages been complained of to the king in the Star-Chamber, or to the parliament.

Andrew Horne, in his *Mirror of Justices* (*i*), mentions many judges punished by King Alfred before the Conquest, for corrupt judgments, and their particular names and offences, which could not be had but from the records of those times.

Our stories mention many punished in the time of

(*h*) 2 Ric. 2, c. 5.

(*i*) Chap. 5, s. 1.

Edward I. (*k*), our parliament rolls of Edward III.'s time, of Richard II.'s time, for the pernicious resolutions given at Nottingham Castle (*l*), afford examples of this kind : in later times, the parliament journals of 18 and 21 Jac. I., the judgment of the ship-money (*m*) in the time of Charles I. questioned, and the particular judges impeached. These instances are obvious, and therefore I but mention them.

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In cases of returns too general upon writs of *habeas corpus*, of many I could urge, I will instance two only.

One Astwick, brought by *habeas corpus* to the King's Bench, was returned to be committed, *per mandatum Nicholai Bacon militis, domini custodis magni sigilli Angliæ virtute cujusdam contemptus in curiâ cancellariâ facti*, and was presently bailed (*n*).

One Apsley, prisoner in the Fleet, upon a *habeas corpus*, was returned to be committed, *per considerationem curiæ cancellariæ pro contemptu eidem curiæ illato*, and upon this return set at liberty (*o*).

In both these cases no inquiry was made or consideration had, whether the contempts were to the law court, or equitable Court of Chancery ; either was alike to the judges, lest any man should think a difference might arise thence.

The reason of discharging the prisoners upon those returns was the generality of them, being for contempts to the court, but no particular of the contempt expressed, whereby the King's Bench could judge, whether it were a cause for commitment or not.

And was it not as supposable, and as much to be credited, that the Lord Keeper and Court of Chancery did well understand what was a contempt deserving commit-

(*k*) See Foss, Judges of England, vol. iii., Biographical notices *temp.* Edw. 1 & Edw. 3. *per* Selden, *arg.*, 3 St. Tr. 279.

(*m*) *Post*, § 3.

(*n*) Moore, 839.

(*l*) Foss, Judges of England, vol. iv. pp. 32, 33 ; Fortescue, R. 392 ;

(*o*) *Id.* 840.

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ment, as it is now to be credited, that the Court of Sessions did understand perfectly what was full and manifest evidence against the persons indicted at the sessions, and therefore it needed not to be revealed to us upon the return?

Hence it is apparent that the commitment and return pursuing it, being too general and uncertain, we ought not implicitly to think the commitment was *re verâ* for cause particular and sufficient enough, because it was the act of the Court of Sessions.

And as to the other part, that the Court of Sessions in London is not to be resembled to other inferior courts of oyer and terminer, because all the judges are commissioned here (which is true), but few are there at the same time, and, as I have heard, when this trial was, none of them were present. However, persons of great quality are in the commissions of oyer and terminer, through the shires of the kingdom, and always some of the judges; nor doth one commission of oyer and terminer differ in its essence, nature, and power from another, if they be general commissions; but all differ in the accidents of the commissioners, which makes no alteration in their actings in the eye of law.

Perjury
when com-
mitted by
jury.

Another fault in the return is, that the jurors are not said to have acquitted the persons indicted, against full and manifest evidence *corruptly*, and *knowing the said evidence to be full and manifest* against the persons indicted, for how manifest soever the evidence was, if it were not manifest to them, and they believed it such, it was not a finable fault, nor deserving imprisonment, upon which difference the law of punishing jurors for false verdicts principally depends.

A passage in Bracton (*p*) is remarkable to this purpose concerning attainting inquests. *Committit jurator perjurium propter falsum sacramentum, ut ex certâ scientiâ*

aliter juraverit quàm res in veritate se habuerit; si autem sacramentum fatum fuerit licet falsum, tamen non committit perjurium, licet re verâ res aliter se habeat quam juraverat, et quia jurat secundum conscientiam eo quòd non vadit contra mentem. Sunt quidam qui falsum dicunt mentiendo, sed se pejerant quia contra mentem vadunt.

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The same words, and upon the same occasion, are in effect in Fleta (q). *Committit enim jurator perjurium quandoque propter falsum sacramentum, ut si ex certâ scientiâ aliter juraverit quam res in veritate se habuerit, secus enim propter factum, quamvis falsum.* And lest any should think that these passages are to be understood only of jurymen's perjuries *in foro conscientiæ*, it is clearly otherwise by both these books, which show how, by the discreet examination of the judge, the error of the jury not wilful, may be prevented and corrected, and their verdict rectified.

And in another place of Bracton (r), in the same chapter: *Judex enim sive justiciarius ad quem pertinet examinatio, si minus diligenter examinaverit, occasionem præbet perjurii juratoribus.* And after: *Et si examinati, cum justo deducantur errore, dictum suum emendaverint, hoc bene facere possunt ante judicium et impunè, sed post judicium non sine pœnâ.*

After these authorities—I would know whether anything be more common, than for two men—students, barristers, or judges, to deduce contrary and opposite conclusions out of the same case in law? And is there any difference that two men should infer distinct conclusions from the same testimony? Is anything more known than that the same author, and place in that author, is forcibly urged to maintain contrary conclusions, and the decision hard, which is in the right? Is anything more frequent in the controversies of religion, than to press the same text for opposite tenets? How, then, comes it to

(q) Lib. v. cap. 22 (ed. by Selden), p. 336.

(r) Fo. 239, b.

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pass that two persons may not apprehend with reason and honesty, what a witness, or many, say, to prove in the understanding of one plainly one thing, but in the apprehension of the other, clearly the contrary thing? Must therefore one of these merit fine and imprisonment, because he doth that which he cannot otherwise do, preserving his oath and integrity? And this often is the case of the judge and jury.

I conclude, therefore, that this return, charging the prisoners to have acquitted Penn and Mead, against full and manifest evidence, first; and next, without saying that they did know and believe that evidence, to be full and manifest against the indicted persons; is no cause of fine or imprisonment.

Verdict and
evidence dis-
tinguished.

And by the way I must here note that the verdict of a jury and evidence of a witness are very different things, in the truth and falsehood of them. A witness swears but to what he hath heard or seen; generally or more largely, to what hath fallen under his senses. But a jurymen swears to what he can infer and conclude from the testimony of such witnesses, by the act and force of his understanding, to be the fact inquired after, which differs nothing in the reason, though much in the punishment, from what a judge, out of various cases considered by him, infers to be the law in the question before him. Therefore Bracton (s):—*Et licet narratio facti contraria sit sacramento, et dicto precedenti, tamen falsum non faciunt sacramentum, licet faciunt fatuum judicium, quia loquuntur secundum conscientiam, quia falli possunt in judiciis suis, sicut ipse justitiarius.*

Return on
commit-
ment for
treason or
felony dis-
tinguished.

There is one objection which hath been made by none, as I remember, to justify this general return, I would give answer to.

A man committed for treason or felony, and bringing a *habeas corpus*, hath returned upon it—that he was com-

mitted for high treason or felony ; and this is a sufficient return to remand him, though in truth this is a general return : for if the specifical fact for which the party was committed were expressed in the warrant, it might then perhaps appear to be no treason or felony, but a trespass, as in the case of the Earl of Northumberland (5 Hen. IV.), questioned for treason in raising power. The Lords adjudged it a trespass ; for the powers raised were not against the king, but some subjects. Why, then, by like reason may not this return be sufficient, though the fact for which the prisoners stood committed particularly expressed, might be no cause of commitment ?

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CASE.
Judgment.

The cases are not alike ; for upon a general commitment for treason or felony, the prisoner (the cause appearing) may press for his trial, which ought not to be denied or delayed, and upon his indictment and trial, the particular cause of his imprisonment must appear, which proving no treason or felony, the prisoner shall have the benefit of it. But in this case, though the evidence given were no full nor manifest evidence against the persons indicted, but such as the jury upon it ought to have acquitted those indicted, the prisoner shall never have any benefit of it, but must continue in prison, when remanded, until he hath paid the fine unjustly imposed on him, which was the whole end of his imprisonment.

We come now to the next part of the return, viz., that “ the jury acquitted those indicted against the direction of the court in matter of law, openly given and declared to them in court.”

Finding
against
direction no
sufficient
ground for
fining jury.

The words, that “ the jury did acquit, against the direction of the court, in matter of law,” literally taken, and *de plano*, are insignificant and not intelligible, for no issue can be joined of matter in law, no jury can be charged with the trial of matter in law barely, no evidence ever was, or can be given to a jury, of what is law, or not ; nor no such oath can be given to, or taken by, a jury, to try

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matter in law; nor no attaint can lie for such a false oath.

Therefore we must take off this veil and colour of words, which make a show of being something, and in truth are nothing.

If the meaning of these words, finding "against the direction of the court in matter of law," be, that if the judge having heard the evidence given in court (for he knows no other) shall tell the jury, upon this evidence, "the law is for the plaintiff, or for the defendant, and you are, under the pain of fine and imprisonment, to find accordingly," then the jury ought of duty so to do, every man sees that the jury is but a troublesome delay, great charge, and of no use in determining right and wrong, and therefore the trials by them may be better abolished than continued: which were a strange new-found conclusion, after a trial so celebrated for many hundreds of years.

For if the judge, from the evidence, shall by his own judgment first resolve upon any trial what the fact is, and so knowing the fact, shall then resolve what the law is, and order the jury penally to find accordingly, what either necessary or convenient use can be fancied of juries, or to continue trials by them at all?

But if the jury be not obliged in all trials to follow such directions, if given, but only in some sort of trials (as for instance, in trials for criminal matters upon indictments or appeals), why, then, the consequence will be, though not in all, yet in criminal trials, the jury (as of no material use) ought to be either omitted or abolished, which were the greater mischief to the people, than to abolish them in civil trials.

And how the jury should, in any other manner, according to the course of trials used, find against the direction of the court in matter of law, is really not conceivable.

True it is, if it fall out upon some special trial, that the

jury being ready to give their verdict, and before it is given, the judge shall ask, whether they find such a particular thing propounded by him? or whether they find the matter of fact to be as such a witness, or witnesses have deposed? and the jury answer, they find the matter of fact to be so; if, then, the judge shall declare—the matter of fact being by you so found to be, the law is for the plaintiff, and you are to find accordingly for him. If, notwithstanding, they find for the defendant, this may be thought a finding in matter of law against the direction of the court; for in that case the jury first declare the fact as it is found by themselves, to which fact the judge declares how the law is consequent.

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Judgment.

And this is ordinary, when the jury find unexpectedly for the plaintiff or defendant, the judge will ask, how do you find such a fact in particular? and upon their answer he will say, then it is for the defendant though they found for the plaintiff, or *e contrario*, and thereupon they rectify their verdict.

And in these cases the jury, and not the judge, resolve and find what the fact is.

Therefore always in discreet and lawful assistance of the jury, the judge's direction is hypothetical and upon supposition, and not positive and upon coercion, viz., if you find the fact thus (leaving it to them what to find), then you are to find for the plaintiff; but if you find the fact thus, then it is for the defendant.

But in the case propounded by me, where it is possible in that special manner the jury may find against the direction of the court in matter of law, it will not follow they are therefore finable; for if an attaint will lie upon the verdict so given by them, they ought not to be fined and imprisoned by the judge for that verdict; for all the judges have agreed upon a full conference at Serjeants' Inn, in this case. And it was formerly so agreed by the then judges in a case where Justice Hyde had fined a jury at Oxford, for finding against their evidence in a civil

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cause. That a jury is not finable for going against their evidence, where an attaint lies; for if an attaint be brought upon that verdict, it may be affirmed and found upon the attaint a true verdict, and the same verdict cannot be a false verdict, and therefore the jury find for it as such by the judge, and yet no false verdict, because affirmed upon the attaint.

Another reason that the jury may not be fined in such case, is, because until a jury have consummated their verdict, which is not done until they find for the plaintiff or defendant, and that also be entered of record, they have time still of deliberation, and whatsoever they have answered the judge upon an interlocutory question of discourse, they may lawfully vary from it if they find cause, and are not thereby concluded.

Whence it follows upon this last reason, that upon trials wherein no attaint lies, as well as upon such where it doth, no case can be invented, wherein it can be maintained that a jury can find, in matter of law, nakedly against the direction of the judge.

And the judges were (as before) all of opinion that the return in this latter part of it, is also insufficient, as in the former, and so wholly insufficient.

But that this question may not hereafter revive if possible, it is evident by several resolutions of all the judges, that, where an attaint lies, the judge cannot fine the jury for going against the evidence or direction of the court, without other misdemeanor.

For in such case, finding against or following the direction of the court barely, will not bar an attaint, but in some case the judge being demanded by, and declaring to, the jury what is the law, though he declares it erroneously, and they find accordingly, this may excuse the jury from the forfeitures; for though their verdict be false, yet it is not corrupt, but the judgment is to be reversed however upon the attaint; for a

man loses not his right by the judge's mistake in the law (t).

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Therefore if an attaint lies for a false verdict upon indictment not capital (as this is) either by the common or statute law, by those resolutions the court would not fine the jury in this case for going against evidence, because an attaint lay.

But admit an attaint did not lie (as I think the law clear it did not), for there is no case in all the law of such an attaint, nor opinion, but that of Thirning (u), for which there is no warrant in law, though there be other specious authority against it, touched by none that argued this case.

The question then will be, Whether before the several Acts of Parliament which granted attaints and are enumerated in their order in the Register (x), the judge by the common law, in all cases, might have fined the jury, going against the evidence and direction of the court, where no attaint did lie, or could do so yet, if the statutes which gave the attaints were repealed.

If he could not in civil causes before attaints granted in them, he could not in criminal causes upon indictment (wherein I have admitted attaint lies not), for the fault in both was the same, viz., finding against evidence and direction of the court; and by the common law, the reason being the same in both, the law is the same.

That the court could not fine a jury at the common law, where attaint did not lie (for where it did, is agreed he could not), I think to be the clearest position that ever I considered, either for authority or reason of law.

After attaints were granted by statutes generally; as by Westminster I. c. 38 in pleas real, and by 24 Edw. 3, c. 7 in pleas personal, and where they did lie at

(t) *Reg. v. Ingersall*, Cro. Eliz. 309.

(u) 10 Hen. 4, Attaint, 60, 64.

Thirning was created Chief Jus-

tice of the Court of Common Pleas, A. D. 1396. See Foss, Judges of Eng., vol. iv. p. 209.

(x) Page 122, a.

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common law (which was only in writs of assise), the examples are frequent in our books of punishing jurors by attaint.

But no case can be offered, either before attaints granted in general, or after, that ever a jury was punished by fine and imprisonment by the judge, for not finding according to their evidence, and his direction, until Popham's time (*y*), nor is there clear proof that he ever fined them for that reason, separated from other misdemeanor. If juries might be fined in such case before attaints granted, why not since? for no statute hath taken that power from the judge. But since attaints granted, the judges resolved they cannot fine where the attaint lies, therefore they could not fine before. Sure this latter age did not first discover that the verdicts of juries were many times not according to the judge's opinion and liking.

But the reasons are, I conceive, most clear, that the judge could not nor can fine and imprison the jury in such cases.

Without a fact agreed, it is as impossible for a judge, or any other, to know the law relating to that fact or direct concerning it, as to know an accident that hath no subject.

Hence it follows, that the judge can never direct what the law is, in any matter controverted, without first knowing the fact; and then it follows, that without his previous knowledge of the fact, the jury cannot go against his direction in law, for he could not direct.

But the judge, *quâ* judge, cannot know the fact possibly but from the evidence which the jury have, but (as will appear) he can never know what evidence the jury have, and consequently he cannot know the matter of fact, nor punish the jury for going against their evidence, when he cannot know what their evidence is.

(*y*) Popham was created Chief Justice of the Queen's Bench, A. D. 1592.

See his commendation of trial by jury, 2 St. Tr. 569.

It is true, if the jury were to have no other evidence for the fact but what is deposed in court, the judge might know their evidence, and the fact from it, equally as they, and so direct what the law were in the case, though even then the judge and jury might honestly differ in the result from the evidence, as well as two judges may, which often happens.

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But the evidence which the jury have of the fact is much other than that : for,

1. Being returned of the vicinage, whence the cause of action ariseth, the law supposeth them thence to have sufficient knowledge to try the matter in issue (and so they must) though no evidence were given on either side in court, but to this evidence the judge is a stranger.

2. They may have evidence from their own personal knowledge, by which they may be assured, and sometimes are, that what is deposed in court is absolutely false : but to this the judge is a stranger, and he knows no more of the fact than he hath learned in court, and perhaps by false depositions, and consequently knows nothing.

3. The jury may know the witnesses to be stigmatised and infamous, which may be unknown to the parties, and consequently to the court.

4. In many cases the jury are to have view necessarily, in many, by consent, for their better information ; to this evidence likewise the judge is a stranger.

5. If they do follow his direction, they may be attainted and the judgment reversed for doing that, which if they had not done, they should have been fined and imprisoned by the judge, which is unreasonable.

6. If they do not follow his direction and be therefore fined, yet they may be attainted (z), and so doubly punished by distinct judicatures for the same offence, which the common law admits not (a).

(z) *Chevin and Paramour's Case*, et eadem causâ, Leg. Max., 6th ed. Dyer, 201, a, 301, a. 316.

(a) *Nemo debet bis puniri pro una*

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7. To what end is the jury to be returned out of the vicinage, whence the cause of action ariseth? To what end must hundredors be of the jury, whom the law supposeth to have nearer knowledge of the fact than those of the vicinage in general? To what end are they challenged so scrupulously to array and poll? To what end must they have such a certain freehold, and be *probi et legales homines*, and not of affinity with the parties concerned? To what end must they have in many cases the view, for their exacter information chiefly? To what end must they undergo the heavy punishment of the villanous judgment (b)? If after all this they implicitly must give a verdict by the dictates and authority of another man, under pain of fines and imprisonment, when sworn to do it according to the best of their own knowledge.

8. A man cannot see by another's eye, nor hear by another's ear, no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning; and though the verdict be right the jury give, yet they, being not assured it is so from their own understanding, are forsworn, at least *in foro conscientie*.

9. It is absurd a jury should be fined by the judge for going against their evidence, when he who fineth knows not what it is, as where a jury find, without evidence in court of either side; so if the jury find upon their own knowledge—as the course is if the defendant plead *solvit ad diem*, to a bond proved, and offers no proof, the jury is directed to find for the plaintiff, unless they know payment was made of their own knowledge, according to the plea (c).

And it is as absurd to fine a jury for finding against their evidence, when the judge knows but part of it; for the better and greater part of the evidence may be wholly

(b) *Post*, p. 149.

(c) *Vide per* Vavisor, Yr. Bk. 14 Hen. 7, 29.

unknown to him, and this may happen in most cases, and often doth (d). BUSHELL'S
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—
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That *decantatum* in our books, *Ad quæstionem facti non respondent iudices, ad quæstionem legis non respondent juratores* (e), literally taken is true; for if it be demanded, What is the fact? the judge cannot answer it; if it be asked, What is the law in the case? the jury cannot answer it.

Therefore the parties agree the fact by their pleading upon demurrer, and ask the judgment of the court for the law.

In special verdicts the jury inform the naked fact, and the court deliver the law; and so is it in demurrers upon evidence, in arrest of judgments upon challenges, and often upon the judge's opinion of the evidence given in Court the plaintiff becomes nonsuit, when, if the matter had been left to the jury, they might well have found for the plaintiff.

But upon all general issues; as upon "not culpable" pleaded in trespass, *nil debet* in debt, *nul tort*, *nul disseisin* in assize, *ne disturba pas* in *quare impedit*, and the like; though it be matter of law whether the defendant be a trespasser, a debtor, disseisor, or disturber in the particular case in issue; yet the jury find not (as in a special verdict) the fact of every case by itself, leaving the law to the court, but find for the plaintiff or defendant upon the issue to be tried, wherein they resolve both law and fact complicately, and not the fact by itself, so as though they answer not singly to the question what is the law, yet they determine the law in all matters where issue is joined and tried in the principal case, except where the verdict is special.

To this purpose the Lord Hobart (f) is very apposite.

(d) See, for instance, *Graves v. Short*, Cro. Eliz. 616.

(e) Leg. Max., 6th ed. 96.

(f) *Needler v. Bishop of Winchester*, Hobart, 227.

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CASE.
Judgment.

“Legally it will be hard to quit a jury that finds against the law, either common law or general statute law, whereof all men were to take knowledge, and whereupon verdict is to be given, whether any evidence be given to them or not. As if a feoffment or devise were made to one *in perpetuum*, and the jury should find cross, either an estate for life, or in fee simple against the law, they should be subject to an attain, though no man informed them what the law was in that case.”

The legal verdict of the jury to be recorded, is finding for the plaintiff or defendant; what they answer, if asked to questions concerning some particular fact, is not of their verdict essentially, nor are they bound to agree in such particulars; if they all agree to find their issue for the plaintiff or defendant, they may differ in their motives as well as judges, in giving judgment for the plaintiff or defendant, may differ in the reasons wherefore they give that judgment, which is very ordinary.

I conclude with the statute 26 Hen. 8, c. 4 (g), That if any jurors in Wales do acquit any felon, murderer, or accessory, or give an untrue verdict against the king, upon the trial of any traverse, recognisance, or forfeiture, contrary to good and pregnant evidence ministered to them by persons sworn before the king's justiciar, then such jurors should be bound to appear before the Council of the Marches, there to abide such fine or ransom for their offence, as that court should think fit.

If jurors might have been fined before by the law, for going against their evidence in matters criminal, there had been no cause for making this statute against jurors for so doing in Wales only.

1. A juror kept his fellows a day and a night without any reason or assenting, and, therefore, awarded to the fleet (h).

This book rightly understood is law. That he staid

Cases considered and objections answered.

(g) Sect. 2.

(h) Lib. Ass. p. 20, pl. 35 *ad fin.*

his fellows a day and a night without any reason or assenting may be understood. That he would not in that time intend the verdict at all, more than if he had been absent from his fellows, but wilfully not find for either side. In this sense it was a misdemeanor against his oath, for his oath was truly to try the issue, which he could never do that resolved not to confer with his fellows. And in this sense it is the same with the case 34 Edw. III., where twelve being sworn and put together to treat of their verdict, one secretly withdrew himself and went away, for which he was justly fined and imprisoned; and it differs not to withdraw from a man's duty by departing from his fellows, and to withdraw from it, though he stay in the same room, and so is that book to be understood (*i*).

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CASE.
Judgment.

But if a man differ in judgment from his fellows for a day and a night, though his dissent may not be as reasonable as the opinion of the rest that agree, yet if his judgment be not satisfied, one disagreeing can be no more criminal than four or five disagreeing with the rest.

2. A juror would not agree with his fellows for two days, and, being demanded by the judges if he would agree, said he would first die in prison, whereupon he was committed, and the verdict of the eleven taken; but upon better advice the verdict of the eleven was quashed, and the juror discharged without fine, and the justices said the way was to carry them in carts until they agreed (*k*), and not by fining them; and as the judges erred in taking the verdict of eleven, so they did in imprisoning the twelfth, and this case makes strongly that the juror was not to be fined who disagreed in judgment only (*l*).

Much of the office of jurors in order to their verdict is

(*i*) Brooke, Abr. Jurors, pl. 46.

(*k*) It has been held (Lib. Ass. p. 253, pl. 11) that if the jurors do not agree in their verdict before the judge is about to leave an assize town, though they are not to be threatened

or imprisoned, the judge is not bound to wait for them, but may carry them round the circuit from town to town in a cart; 3 Steph. Com. 569.

(*l*) Lib. Ass. p. 253, pl. 11.

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—
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ministerial, as not withdrawing from their fellows after they are sworn, not withdrawing after challenge, and being tried in before they take their oath; not receiving from either side evidence after their oath not given in court, not eating and drinking before their verdict, refusing to give a verdict and the like; wherein if they transgress they are finable, but the verdict itself, when given, is not an act ministerial but judicial, and according to the best of their judgment, for which they are not finable nor to be punished, but by attaint (*m*).

3. The case of 7 Rich. II. (*n*) was cited, where upon acquittal of a common thief, the judge said, "The jury ought to be bound for his good behaviour during his life." But saith the book, *quere per quel ley*, but that was only *gratis dictum* by the judge, for no such thing was done as binding them.

4. *Bradshaw v. Salmon* (*o*) was urged, where a jury had given excessive damages upon a trial in an action of covenant, and the court of Star-Chamber gave damages to the complainant almost as high as the jury had given upon the trial; but the jury who gave the damages were not questioned; though, said the book, they might have been, because they received briefs from the plaintiff, for whom they gave damages, which was a misdemeanor; but the express book is, that the jury could not be punished by information for the excessive damages, but only by attaint therefore, not for their false verdict without other misdemeanor; which answers some other cases alleged.

Nor can any man show (though it was said), that a jury was ever punished upon an information, either in law, or in the Star-Chamber, where the charge was only for finding against their evidence, or giving an untrue verdict, unless embracery, subornation, or the like, were joined.

(*m*) Year Bk. 36 Hen. 6, pl. 27;
Brooke, Abr. Jurors, pl. 18.

(*n*) Fitz. Abr. "Corone," pl. 108.
(*o*) Hobart, 114.

5. It was said a perjury *in facie curiæ* is punishable by the judge, and such is it if jurors go against their evidence; perhaps a witness may be punished for perjury *in facie curiæ* (which I will not maintain to be law), but a jury can never be so punished, because the evidence in court is not binding evidence to a jury, as hath been showed.

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CASE.
—
Judgment.

6. Some records were cited, of fines *pro conclamento*; no doubt it is an article inquirable in every Oyer and Terminer, and one jury may find it upon another.

7. *Watts v. Brains* (*p*) was urged, but the jurors were there fined for a manifest combination to delude the court, by agreeing upon two verdicts and concealing the latter, if the court would be satisfied with the former.

8. *Wharton's Case* (*q*), reported by two reporters:—Yelverton saith, that the judges, whereof Popham was one and a privy counsellor, were very angry, and fined the jury for their verdict and finding against direction.

In those reports that pass under the name of Noy the same case is reported (*r*), with this, that the judges conceived the jury had been unlawfully dealt with to give that verdict; which, if true, the fining was lawful, and the case therein reported short by Yelverton.

9. *Wagstaff's Case* in the King's Bench lately was the same with the present case, but by the record it is reasonable to think that the jurors committed some fault, besides going against their evidence, for they were unequally fined.

But, however, all the judges having, upon this return, resolved, that finding against the evidence in court or direction of the court barely, is no sufficient cause to fine the jury, answers all the cases if not answered before.

(*p*) Cro. Eliz. 778.

(*q*) Yelverton, 23; Noy, 48.

(*r*) Noy, 48, where a precedent is cited in these words: "The jurors acquitted a prisoner contrary to their

evidence, and for that they were fined and imprisoned, and bound for the good behaviour of the prisoner during his life."

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CASE.
Judgment.

10. There remain *Southwell's Case*, reported by Leonard (s), some cases out of the Court of Wards in *Lannoy's Case* (t), where jurors were sent to the Fleet, or threatened to be sent for not finding offices (u) according to the direction of the court. (1.) An inquest of office is not subject to an attain. (2.) It neither determines any man's right, nor doth any party put any trial upon them. (3.) They are only to find naked matter of fact (x); but principally an office for the king is in many cases as necessary as an entry for a common person, without which he can never come by or try his right, nor can the king, without an office, know whether he hath a right to a ward, a mortmain, or the like, and as it is an injury to hinder a man from his entry whereby his right may be tried, so it is not to find an office for the king whereby his right may be tried, which concludes no man, but enables the king to a trial of his right, and, in truth, is only a finding of matter of fact and no more. Wherefore, perhaps, it may be an offence, as of a witness refusing his testimony, not to find an office for the king where clear proof is made of the matter of fact; but if proof be not made at all, or be altogether doubtful, or the matter be matter of law, the inquest may find an *ignoramus* which a jury, upon a trial, can never do. But of this I shall say no more, it concerning not the case in question (y).

(s) See also *Smith v. Peaze*, Leon. 17; *Morrison v. West*, *Id.* 132.

(t) Moore, 730.

(u) "Proceeding under an inquisition, or inquest of office, or an office as it is termed in the old books, is a peculiar prerogative remedy for the benefit of the Crown. It is an inquiry made through the medium of jurors, summoned by the sheriff, concerning any matter entitling the king to the possession of lands, or tenements,

goods, or chattels." Chit. Prerog. Cr. 246.

(x) Year Bk. 3 Hen. 7, p. 10; Year Bk. 2 Hen. 4, p. 5.

(y) The Chief Justice next proceeded to show by various precedents, that the Court of Common Pleas had discharged on *habeas corpus* persons imprisoned by other courts on the ground of insufficiency of the return. See the Note to *Darnel's Case*, *post*.

And all the judges having, as above stated, resolved upon this return, that finding against the evidence or direction of the court is no sufficient cause to fine a jury, the prisoners were discharged.

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CASE.
Judgment.

Foremost amongst the privileges assured to the subject by the protection of the sovereign is liberty and security of the person (*z*). The Crown cannot derogate from these rights. Bracton, who has been designated (*a*) “the best of our juridical classics,” tells us (*b*) that the king is under the law, for the law makes the king. And Sir E. Coke, during the parliamentary debate on the liberty of the subject, observes (*c*):—“It is true, that the king’s prerogative is a part of the law of this kingdom, and a supreme part, for the prerogative is highly tendered and respected of the law; yet it hath bounds set unto it by the laws of England.”

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BUSHELL'S
CASE.

The king cannot indeed interfere illegally with the liberty of the subject, nor deprive him of any of his rights (*d*).

(*z*) See Sir E. Coke’s reasons “in affirmance of the ancient laws and precedents made for the liberty of the subject,” 3 St. Tr. 128.

(*a*) Sir W. Jones, Treatise on Bailments, 75.

(*b*) Lib. i. fo. 5, cited 12 Rep. 65; *et vide* lib. iii. fo. 107; *per* Sir O. Bridgman, C. B., 5 St. Tr. 991.

“Towards the king himself the law doth a double office or operation. The first is to intitle the king, or design him; and in that sense Bracton saith well—*lex facit quod ipse sit rex (ubi supra)*; that is, it defines his title; as, in our law, that the kingdom shall go to the issue female;

that it shall not be departable amongst daughters; that the half-blood shall be respected; and other points differing from the rule of common inheritance.” The second is “to make the ordinary power of the king more definite, or regular.” “And although the king, in his person, be *solutus legibus*, yet his acts and grants are limited by law, and we argue them every day.” *Per* Bacon, *arg.*, 2 St. Tr. 580.

(*c*) 3 St. Tr. 68.

(*d*) “The king has no power to deprive the subject of any of his rights, but the king, acting with the other branches of the legislature, as

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CASE.

"How absolute soever," says Mr. Emlyn (*e*), "the sovereigns of other nations may be, the King of England cannot take up or detain the meanest subject at his mere will and pleasure; it is one of the privileges confirmed by Magna Carta, that no man shall be restrained of his liberty but by the law of the land." *Nullus liber homo capiatur vel imprisonetur * * aut aliquo modo destruatur * * nisi per legale iudicium parium suorum vel per legem terræ; nulli vendemus, nulli negabimus, aut differemus iustitiam vel rectum.* Such are the words which the sovereign addresses to his subjects in the Great Charter (*f*): such are the positive assurances which he gives them. No man shall be forcibly seized or imprisoned, nor shall his ruin and destruction be anyhow effected, unless by the lawful judgment of his peers, or by the law and customs of the land. Justice shall not be sold, or denied, or delayed to any man.

The king is
the fountain
of justice.

The king is the fountain of justice in this country (*g*), and from its regal source justice, in the earlier ages, flowed much more directly than it does at present to the subject. Allusion has been made by learned persons, to the fact that King John, Henry III., and other kings, have sat in the courts of King's Bench and Exchequer (*h*), though, as

one of the branches of the legislature, has the power of depriving any of his subjects, in any of the countries under his dominion, of any of his rights." *Per* Sir J. Leach, M.R., *Cuvillier v. Aglwin*, 2 Knapp, P. C. C. 78; cited 5 Moo. P. C. C. 295, 304.

"The king's pleasure is not binding without the assent of the realm." *Per* Sir E. Coke, 3 St. Tr. 69.

(*e*) Pref. to his edition of the State Trials, xxvi.

(*f*) Cap. 29.

(*g*) Dugd. Orig. Jurid. 19, 22; Com. Dig. Justices (A); 2 Steph. Com. 505; Plowd. 237, 242. 1 Stubbs, Const. Hist. 337.

(*h*) *Per* Mr. St. John, *arg.*, 3 St. Tr. 861, 862; 3 Rep. 64; Dugd. Orig. Jurid. 38; Bracton, lib. iii. caps. 9, 10; Britton (ed. 1762), p. 3. In Sir F. Palgrave's Treatise on "The Original Authority of the King's Council," 62, we read that "the functions delegated to the judges of the King's Bench were not unfre-

remarked by Mr. St. John (i), for aught that appears, they were assisted by their judges; and he argues that the "king alone, without assistance of the judges of his court, cannot give judgment," nor impose a fine. Nevertheless, the *Case of Prohibitions* (k), shows that King James I. was advised to assume for himself the power to decide causes in his own royal person, being informed by the ecclesiastics that "the judges are but the delegates of the king, and that the king may take what causes he shall please to determine from the determination of the judges, and may determine them himself." This threatened assumption of judicial power by the Crown was strenuously opposed by Lord Coke, then Chief Justice of England, who, in the presence and with the consent of all the judges, declared that "the king in his own person cannot adjudge any case, either criminal, as

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BUSHELL'S
CASE.

*Case of Pro-
hibitions.*

quently exercised by the sovereign, as late as the reign of Edw. 1 and Edw. 2, and in Parliament and the council we find the personal jurisdiction of the king extending until a subsequent period." Allen on Royal Prerog., 92.

Dr. Henry, in his History of Great Britain, vol. 5, p. 382, with reference to the period intervening between the accession of Hen. 4 and that of Hen. 7, observes, "I am not so certain that it was understood to be a part of the constitution of England in this period, that the king could not interpret the laws and administer justice to his subjects in person, but only by his judges. This, however, was so much the practice that I have met with only one exception to it, if it is, indeed, an exception. Edward 4, in the second year of his reign, sat three days together during Michaelmas

Term in the Court of King's Bench, but it is not said that he interfered in the business of the court; and, as he was then a very young man, it is probable that it was his intention to learn in what manner justice was administered rather than to act the part of a judge. The same prince, in the seventeenth year of his reign (A.D. 1477), when the country was overrun with numerous gangs of robbers, accompanied the judges of assize in their circuits; but his design in doing this seems to have been to prevent the judges from being insulted or intimidated, and to secure the execution of their sentences." *Et vide, per Littleton, arg.*, 3 St. Tr. 942.

(i) 3 St. Tr. 861, 862; *per* Sir E. Coke, *Id.* 129.

(k) 12 Rep. 63.

NOTE TO
BUSHELL'S
CASE.

King—can-
not per-
sonally
administer
justice ;

treason, felony, &c., or betwixt party and party, concerning his inheritance, chattels, or goods, &c.; but this ought to be determined and adjudged in some court of justice, according to the law and custom of England," and the judges, on this occasion, further informed the king that no king, after the Conquest, had assumed to himself to give any judgment in any case whatsoever, which concerned the administration of justice within this realm, but "these were solely determined in the courts of justice;" the law being "the golden met-wand and measure to try the causes of the subjects, and which protected his Majesty in safety and peace."

—may create
new courts.

So in *Floyd v. Barker* (l), we read that "the king himself is *de jure* to deliver justice to all his subjects, and for this, that he himself cannot do it to all persons, he delegates his power to his judges, who have the custody and guard of the king's oath." And in *Gentleman's Case* (n), it is laid down that "the king may create a new court, and appoint new judges in it; but after the court is created and established, the judges of the court ought to determine matters in it."

The noticeable *Case of Prohibitions*, above cited, may be said to have finally settled the point actually mooted in it, but yet there are, during subsequent periods, indications of attempted interference by the Crown with the ordinary course of justice, which have been successfully repelled and repudiated by the judges. For instance, at the trial of Felton (*temp.* Car. I.), for the murder of the Duke of Buckingham (n), it was demanded of the judges, whether torture, with a view to extorting a confession from the accused, might not lawfully be employed, and

(l) 12 Rep. 23, 25.

(m) 6 Rep. 11.

(n) 3 St. Tr. 367, 371.

when the judges had agreed that no such punishment is known to or allowed by our law (*o*), the king's desire was conveyed to them that some punishment, added to what the law ordains for murder, should be inflicted on the convict. But the court answered that it could not be, for in all such murders the judgment was the same. Again, at the trial of Hales (*p*), for forging a promissory note, in answer to an application by counsel for the Crown, in aggravation of punishment beyond that which the court held could legally be awarded, the presiding judge observed, "I am not for extending it to torture; I know not any precedent, nor would I begin anything, of that nature. The king himself is limited by our law."

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BUSHELL'S
CASE.

Direct personal interference by the Crown with the Bench has in this country been less prejudicial to the public than a secret tampering with justice, which has not unfrequently been indulged in. Sir E. Coke, indeed, speaks of the judges as being *concilium regis*—the king's council for matters in law (*q*). "But," as remarked by Mr. Hargrave (*r*), "he omits explaining whether they are so called on account of their judicial opinions in the king's courts, of their opinions in parliament when advised with by the lords, or any extra-judicial opinions the king may be entitled to demand from them." Nor does the statutory oath (*s*) formerly adminis-

The judges
formerly
consulted by
the Crown.

(*o*) 3 St. Tr. 371; *per* Nolan, *arg.*, *R. v. Picton*, 30 *Id.* 892; 2 *Inst.* 48; 4 *Steph. Com.* 393, n. See *Peacham's Case*, 2 St. Tr. 869; *R. v. Huggins*, 17 *Id.* 297. Jardine, *Reading on the use of Torture*, pp. 11 *et seq.*, 50, 57, who says, "The last instance of torture in England, of which I can find any trace, occurred in the year 1640."

(*p*) 17 St. Tr. 295.

(*q*) *Co. Litt.* 110, a., 304, a. See the cases as to the Court of High Commission, 12 *Rep.* 84, 88.

(*r*) *Co. Litt.* 110, a., n. (4).

(*s*) See stat. 18 *Edw.* 3, st. 4. Lord Coke denies, however, that this so-called statute has "the warrant of an Act of Parliament." 3 *Inst.* 223, 224. See 4 *Inst.* 109. For the form

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BUSHELL'S
CASE.

Extrajudi-
cial opinions
of judges.

tered to the judges—whereby they swore that they would lawfully counsel the king in his business—assist to a solution of the question.

Certainly, till towards the close of the seventeenth century, the sovereign did not scruple often to take counsel, as it were, with his judges—to ascertain and elicit their opinions upon a specific question before it had been brought judicially before them (*t*). Such a practice is objectionable. It must tend to the undue advancement of the prerogative (*u*) and adversely to the independence of the Bench; besides, as observed by Chief Justice Vaughan (*x*), “an extra-judicial opinion given in or out of court is no more than the *prolatum* or saying of him who gives it, nor can be taken for his opinion unless everything spoken at pleasure must pass as the speaker’s opinion.” An opinion, says that learned judge, even when given in court, if not necessary or relevant to the judgment, which might have been as well given if no such or a contrary opinion had been broached, is no judicial opinion, nor more than a *gratis dictum*. “But an opinion, though erroneous, concluding to the judgment is a judicial opinion, because delivered under the sanction of the judge’s oath, upon deliberation, which assures it is or was, when delivered, the opinion of the deliverer” (*y*).

of oath now taken by judicial officers, see 31 & 32 Vict. c. 72, s. 4.

(*t*) Burnet, Hist. vol. i. pp. 669, 671. *Proceedings against Stroud and others*, 3 St. Tr. 237—239, 287; Questions proposed to the judges in *The Case of Ship-money*, *Id.* 844; 19 St. Tr. 1070; *Case of Corporations*, 4 Rep. 77. See also White-
locke’s Memorials, 13; Fortescue, R. 384, 385.

(*u*) See the account of the interference by King James I. with the judges in *The Case of Commendams*, 1 Hallam, Const. Hist. Eng. 347.

(*x*) Vaugh. R. 382.

(*y*) See further, as to extra-judicial opinions, Ram, Science of Legal Judgment, Chap. 5; *Beckman v. Maplesden*, O. Bridgm. 78, where a distinction is taken between “cases

"However numerous and strong," moreover, as observed by a very learned writer (z), "the precedents may be in favour of the king's extra-judicially consulting the judges on questions in which the Crown is interested, it is a right to be understood with many exceptions, and such as ought to be exercised with great reserve lest the rigid impartiality so essential to their judicial capacity, should be violated. The anticipation of judicial opinions on causes actually depending should be particularly guarded against, and therefore a wise and upright judge will ever be cautious how he extra-judicially answers questions of such a tendency."

NOTE TO
BUSHELL'S
CASE.

Objections
to the prac-
tice.

We find Lord Coke strongly objecting to this practice (a), which, endangering the independence of the Bench, threatened to sap the liberties of the people. He says (b), explicitly, "to the end that the trial may be the more indifferent, seeing that the safety of the prisoner consisteth in the indifferency of the court, the judges ought not to deliver their opinions beforehand of any criminal case that may come before them judicially." And he adds that in the case of Humphry Stafford (c), accused of treason, Hussey, C. J. (d), besought King

adjudged upon debate and having counsel on both sides, and resolution upon a case reported or referred to" the judges.

(z) Mr. Hargrave's Note, Co. Litt. 110, a. (5).

(a) See the account of Sir E. Coke's conduct in *The Case of Commendams*, Biograph. Britann. 2nd ed. vol. iii. p. 688; Hallam, Const. Hist. Eng., vol. i. p. 347. See Bacon's letters to King James I concerning *Peacham's Case*, 2 St. Tr. 871; Fost. Cr. Law, 199; Luders Tracts, vol. i. pp. 110,

113, 118.

(b) 3rd Inst. 29.

(c) Year Bk. 1 Hen. 7, p. 25; cited Luders Tracts, vol. i. p. 163; Fortescue, R. 389, where various instances are collected in which the judges have been consulted in criminal matters. See *The Case of Ship-money*, post.

(d) Hussey (or Huse) was Chief Justice of the King's Bench, temp. Richard 3 & Hen. 7; 5 Foss, Judges of England, 56; 3 Reeves, Hist. Eng. Law (ed. 1869), 200.

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Henry VII. that he would not desire to know their opinions beforehand concerning Humphry Stafford, "for they thought it should come before them in the King's Bench judicially, and then they would do that which of right they ought; and the king accepted of it. And therefore the judges ought not to deliver their opinions beforehand upon a case put and proofs urged of one side in absence of the party accused . . . for how can they be indifferent who have delivered their opinions beforehand, without hearing of the party, when a small addition or subtraction may alter the case? And how doth it stand with their oath, who are sworn that they should well and lawfully serve our lord the king and his people in the office of a justice, and they should do equal law and execution of right to all his subjects" (e) ?

At the end of *Calvin's Case* (f), we find Lord Coke, then Chief Justice of the Common Pleas, declaring publicly in the Exchequer Chamber, "that no commandment or message, by word or writing, was sent or delivered from any whatsoever to any of the judges to cause them to incline to any opinion in this case; which I remember, for that it is honorable for the State and consonant to the laws and statutes of this realm."

Practice of
extrajudi-
cial consul-
tation by the
Crown dis-
continued.

The practice of consulting the judges and eliciting extra-judicially their opinions has gradually fallen into desuetude; the last occasion when this was done having been A.D. 1760, when, before the trial by court-martial of Lord George Sackville, on a charge of cowardice at the battle of Minden, the judges were consulted upon the question whether he could legally be so tried, his

(e) 18 Edw. 3, st. 4; 20 Edw. 3, c. 1.

(f) 7 Rep. 28, a.

name having been previously erased from the army list (g).

NOTE TO
BUSHELL'S
CASE.

Not only may the House of Lords, when sitting as the highest tribunal in the realm, consult the judges by submitting to them questions bearing on any case *sub judice* (h), but that house may constitutionally also propound to the judges abstract questions of law, the answers to which may be necessary to guide the House in its legislative capacity (i). For instance, prior to the passing of Mr. Fox's Libel Act, A.D. 1792, a series of seven questions, having reference to the then existing law of libel, was submitted to and answered by the judges (k); who will, however, decline to entertain any question put to them by the lords which is not confined to the strict legal construction of the existing law (l).

The judges
are con-
sulted by
the House
of Lords.

The independence of the judges constitutes one of the surest safeguards of our liberties, and their independence may best be maintained by withholding from them the temptation of privately advising upon any case which is to come judicially before them, and upon which they are sworn to "do right to all manner of people after the laws and usages of this realm." Publicity in delivering judgment is an additional safeguard for the people against any official tampering with the honour of the Bench. A public statement of the reasons for a judgment is due to the suitors and to the community at large—is essential to the establishment of fixed in-

Independ-
ence of
judicial
bench.

(g) *Ex relatione* the late Right Hon. Sir D. Dundas.

(h) 3 Inst. 29, 30; *Proceedings against the Duke of Buckingham and others*, 2 St. Tr. 1304.

(i) *M'Nughten's Case*, 10 Cl. & F. 200, 212-214, and precedents there

cited. See also Wilmot's Opinions, 77, regarding certain questions as to the writ of *habeas corpus* which were submitted to the judges.

(k) 22 St. Tr. 296 *et seq.*

(l) *In Re, The London and Westminster Bank*, 2 Cl. & F. 191.

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telligible rules, and for the development of law as a science. The expressed reason of a judgment is so important an ingredient in it that the practice seems reprehensible of altering the reasoning publicly avowed as the basis of a judgment and handing privately to the reporter other reasonings in support of it which had not been specified in open court. A judgment once delivered becomes the property of the profession and the public; it ought not, therefore, to be subsequently moulded in accordance with the vacillating opinions of the judge who first pronounced it.

Interference
with juries
by the
Crown.

Not merely by directly communicating with the judges, but also by intimidating juries through them, has the Crown, at various epochs of our history, put in peril the liberties of the subject. Two methods have formerly been adopted—the one legal, the other opposed to law—of punishing a jury for false verdict; that by attain, which, in some cases, was available at common, in others by force of the statute, law; and that by fine and imprisonment imposed, in an arbitrary manner, at the discretion of the judge.

Attain.

“Attain,” says Sir H. Finch (*m*), “is to inquire whether a jury of twelve men gave a false verdict, that so the judgment following upon it may be reversed, and the party restored to all that he hath lost, that is to say, if it be the defendant to his damages, and whatsoever else; if the plaintiff, to his title, his action, &c., for an attain lieth not till judgment be given, and if the writ bear date before, it shall abate” (*n*). This

(*m*) Finch, Law, p. 484.

(*n*) By stat. 11 Hen. 6, c. 4, the plaintiff in an attain could recover his damages and costs against the

jurors and defendant. See also 15 Hen. 6, c. 5, which directed what sort of persons might be impanelled upon an attain, and in the preamble

writ (*o*), as appears from the judgment of Vaughan, C. J. (*p*), lay at common law, and in the reign of Henry II. (*q*), upon writs of assize only, but by various statutes (*r*) it was successively allowed in pleas of land or freehold or things touching the freehold (*s*), in writs of trespass (*t*), and in "every plea, real as well as personal" (*u*). The jury to try the verdict alleged to be false were in number twenty-four and were called the grand jury, for the law willed not that "the oath of one jury of twelve men should be attainted or set aside by an equal number, nor by less indeed than double the former" (*v*).

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In what
cases writ of
attaint lay.

At the day of trial (*x*), the record of the former assize was read, in the presence of the twenty-four and the former twelve jurors, and the complainant was asked to specify in what points the latter had sworn falsely. When he had done this, each of the twenty-four took an oath that he would speak the truth as to all that should be required of him. The judge explained the matter in dispute, and, as the verdict was in favour of the one side or the other acquittal or condemnation followed. The verdict of the second jury was final, and, if opposed to that of the jury of twelve, operated to annul it, and to convict the jury who gave it of perjury and false verdict. On such conviction the twelve jurors were arrested and imprisoned, their lands and chattels were forfeited to the

Proceedings
in cases of
attaint.

sets forth that "the great fearless and shameless perjury, which horribly continueth and daily increaseth in the common jurors of the said realm, is most likely to tend to the greatest mischief."

(*o*) See the form, Forsyth, Hist. Trial by Jury, 181.

(*p*) *Ante*, p. 129.

(*q*) Toml. Law Dict. *ad verb.*

"Attaint."

(*r*) Finch, Law, 486.

(*s*) Westm. 1, 3 Edw. 1, c. 37.

(*t*) 1 Edw. 3, st. 1, c. 6; 5 Edw. 3, c. 7; 28 Edw. 3, c. 8.

(*u*) 34 Edw. 3, c. 7.

(*v*) 3 Steph. Com. 581; Barrington, Observations on the Statutes, p. 87.

(*x*) Forsyth, Hist. Trial by Jury, 181 *et seq.*

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king, and they became, for the future, infamous. At a later period, indeed, the law added even to the severity of this sentence,—that the wives and children of the attainted jurors should be turned out of their homes, that their houses should be thrown down, their trees be rooted up, and their meadows ploughed (*y*). The punishment of perjury in jurors for a false verdict, being at common law thus severe, was mitigated by the legislature (*z*), an election being thenceforth allowed for a party grieved whether to ground his writ of attaint upon statute, or to take his remedy at common law (*a*).

No attaint in
criminal
matter.

An attaint lay only in civil cases (*b*). “It seems to be certain,” writes Mr. Serjeant Hawkins (*c*), near the middle of the last century, “that no one is liable to any prosecution whatsoever, in respect of any verdict given by him in a criminal matter, either upon a grand or petit jury; for since the safety of the innocent and punishment of the guilty doth so much depend upon the fair and upright proceeding of jurors, it is of the utmost consequence that they should be as little as possible under the influence of any passion whatsoever. And, therefore, lest they should be biassed with the fear of being harassed by a vexatious suit for acting according to their consciences (*d*), the law will not leave any possibility for a prosecution of this kind. It is true, indeed, that jurors were formerly sometimes questioned in the Star-Chamber for their partiality, in finding a manifest offender not guilty; but

(*y*) Forsyth, Hist. Trial by Jury, 183; Co. Litt. 294, b.; 3 Inst. 164.

(*z*) 23 Hen. 8, c. 3; 13 Eliz. c. 25.

(*a*) 3 Inst. 164.

(*b*) *Ante*, p. 129. *Floyd v. Barker*, 12 Rep. 23.

(*c*) Pleas, Cr., bk. i. chap. 73, s. 5.

(*d*) See *The Proceedings against Blair and others* before the Court of Justiciary, 11 St. Tr. 75, and *ibid.* in *notis*.

this was always thought a very great grievance, and surely as the law is now settled by *Bushell's Case*, there is no kind of proceeding against jurors in respect of their verdicts in criminal matters allowed of at this day. As to the objection that an attaint lies against a jury for a false verdict in a civil cause, and that there is as much reason to allow of it in a criminal one, it may be answered that in an attaint a man's property only is brought into question a second time, and not his liberty or life." There is, moreover, as remarked by Mr. Barrington, commenting on the statute of Westminster I. (e), a strong presumption that no jury would condemn a criminal contrary to the evidence, and it would be inconsistent with principles of liberty to permit the Crown, when it might intend oppression, to call in question a verdict of acquittal (f).

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The writ of attaint was abolished by stat. 6 Geo. 4, c. 50 (g), of which sect. 61 provides that, notwithstanding anything therein contained, "every person who shall be guilty of the offence of *embracery* (h), and every juror who shall wilfully or corruptly consent thereto, shall and may be respectively proceeded against by indictment or information, and be punished by fine or imprisonment in like manner as every such person and juror might have been before the passing of this act."

Attaint—
abolished
by statute :

Long prior to the abolition by express enactment of the procedure by attaint, this indirect method of impugning and reviewing the verdict of a jury had in practice

—super-
seded by
motion for
new trial.

(e) Observations on the Statutes, 87.

(f) See *Reg. v. Duncan*, 7 Q. B. D. 198; 50 L. J., M. C. 95.

(g) Sect. 60.

(h) Embracery "is an attempt to

influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like." 4 Steph. Com. 262; 1 Russell on Crimes, 5th ed. 360.

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New trial

—in civil
cases ;

—in criminal
cases,

been superseded by the motion for a new trial (*i*), which will usually be granted should the court be satisfied that there are strong probable grounds for supposing that the merits of the case have not been fully and fairly discussed, and that the decision come to is not consonant with truth and justice (*k*). Trial by jury, it was observed by Lord Mansfield, C. J. (*l*), in civil causes could not subsist now without a power somewhere to grant new trials. "I have always considered this mode of application for a new trial," said De Grey, C. J. (*m*), "as very salutary to the suitors who may be injured by mistakes, and likewise to the jury, as it reforms their errors, if they commit any, and is a happy substitute for the much more grievous proceeding that the common law had directed." The granting of a new trial is not however wholly restricted to civil causes, for where an indictment for misdemeanor has been preferred in the Queen's Bench Division of the High Court of Justice, or has been removed into that division by *certiorari* a new trial may, after conviction, be moved for, upon this ground, *inter alia*, that the verdict was contrary to evidence (*n*).

(*i*) Sir Thomas Smith, *temp.* 1583, says that attainds were then "very seldom put in use ;" Commonwealth of England (ed. 1635), bk. iii. chap. 2, p. 207.

In *Bright v Eynon*, 1 Burr. 393, Lord Mansfield, C.J., says (A.D. 1757) "The writ of attaind is now a mere sound in every case ; in many it does not pretend to be a remedy."

The first instance on record of a new trial being granted was A.D. 1665. Forsyth, *History of Trial by Jury*, 186.

(*k*) See Arch. Pr., part xi. chap. 98, 13th ed. Rules *nisi* on motions for new trials are abolished by Rules Sup. Court, 1883, Ord. XXXIX., r. 3.

(*l*) 1 Burr. 393.

(*m*) *Fabrigas v. Mostyn*, 20 St. Tr. 175 ; 1 Sm. L. C. 652, 8th ed.

(*n*) Arch. Crim. Pl. 18th ed. 188 ; 4 Steph. Com. 436. A new trial cannot be had in a case of felony ; see *Reg. v. Bertrand*, L. R. 1 P. C. 520 ; *Reg. v. Duncan*, 7 Q. B. D. 198 ; 50 L. J., M. C. 95.

Neither in a civil nor in a criminal case will an action for false verdict and damage thence resulting lie against a juror, this rule having long been established, in deference to principles which will hereafter be more fully stated (o).

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As to the unconstitutional practice of fining and imprisoning jurors for alleged false verdict, a few brief remarks will be sufficient. In the principal case Chief Justice Vaughan observes (p) that, "no case can be offered—either before attaints granted in general or after—that ever a jury was punished by fine and imprisonment by the judge for not finding according to their evidence and his direction until Popham's time (q), nor is there clear proof that he ever fined them for that reason, separated from other misdemeanor." Sir Nicholas Throckmorton was tried and acquitted on a charge of high treason in the first year of the reign of Queen Mary, A.D. 1554 (r), and then indeed we read that "the court, being dissatisfied with the verdict, committed the jury to prison," and that such of the jury as refused to admit themselves in error were fined by the Court of Star-Chamber (s)—not, it is to be observed, by the judges who presided at the trial,—and imprisoned till the fines were paid. So the jury who acquitted Lilburne, A.D. 1653, for returning into England when under banishment by Act of Parliament, were summoned before the Council of State, in pursuance of an Order of Parliament, to answer for their con-

Illegal
practice of
fining and
imprisoning
jurors.

(o) *Post*, Part II.

(p) *Ante*, p. 130, *et vide* the precedents considered *ante*, p. 134 *et seq.*

(q) As to Chief Justice Popham, *vide ante*, p. 130 (y).

(r) 1 St. Tr. 869.

(s) In *Floyd v. Barker*, 12 Rep.

23, it was resolved that "when a jury hath acquitted a felon or traitor against manifest proof, then they may be charged in the Star-Chamber for their partiality in finding a manifest offender not guilty *ne maleficia remanent impunita*."

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duct (*t*); and other instances to a like purport or in which jurors have been grievously intimidated and coerced, might be educed from historic records (*u*).

Courts of
Star-Cham-
ber and High
Commission.

"Although," says Mr. Erskine, arguing on behalf of the *Dean of St. Asaph* (*x*), "our ancestors had stipulated by Magna Carta that no freeman should be judged but by his peers, the Courts of Star-Chamber (*y*) and High Commission (*z*), consisting of Privy Counsellors erected during pleasure, opposed themselves to that freedom of conscience and civil opinion which even then were laying the foundations of the Revolution. Whoever wrote on the principles of government was pilloried in the Star-Chamber, and whoever exposed the errors of a false religion was prosecuted in the Commission Court." But the prerogatives which former princes exercised with safety "were not to be tolerated in the days of the first Charles, and our ancestors insisted that these arbitrary tribunals should be abolished" (*a*); the whole policy of

(*t*) 5 St. Tr. 445.

(*u*) *Trial of Penn and Mead*, 6 St. Tr. 961 *et seq.*; *Proceedings in Parliament against Chief Justice Kelyng, Id.* 992, which resulted in a resolution of the House of Commons "that the precedents and practice of fining or imprisoning juries for verdicts is illegal." *Trial of Lady Alice Lisle*, 11 St. Tr. 372; Smith's Commonwealth of England, bk. iii. chap. 1. See also *Duke of Norfolk v. Germaine*, 12 St. Tr. 948 (A.D. 1692), where the jury "had a severe reprimand from the court" for giving small and insufficient damages.

A jury may, however, be punishable for misconduct in certain cases, which are enumerated by Serjeant Hawkins, P. C., bk. ii. chap. 22, ss.

13-24.

(*x*) 21 St. Tr. 924. Erskine's Speeches, vol. i. 151.

(*y*) Smith's Commonwealth of England, bk. iii. chap. 4; 4th Inst. 60.

(*z*) 3 Steph. Com. 312; 4 Do. 374; the case as to the Court of High Commission, 12 Rep. 19, 84, 88. The court of High Commission owed its origin to the stat. 1 Eliz. c. 1; 4th Inst. 324. Hallam, Const. Hist. vol. i. 201.

(*a*) By stats. 16 Car. 1, c. 10, & c. 11.

See *The Proceedings against Dr. Compton*, 11 St. Tr. 1123, which were in contempt of the latter statute. The Bill of Rights (1 Will. & M. sess. 2. c. 2) declared "the commission for erecting the late Court of

this change consisting in the principle, "that the judges at Westminster in criminal cases were but a part of the court, and could only administer justice through the medium of a jury." This is a sound constitutional exposition of the matter—in accordance, moreover, with what Plowden (*b*) tells us of the respective functions of judge and jury. "The office of twelve men," he says, "is no other than to inquire of matters of fact, and not to adjudge what the law is, for that is the office of the court and not of the jury, and if they find the matter of fact at large, and further say that thereupon the law is so, where in truth the law is not so, the judges shall adjudge according to the matter of fact, and not according to the conclusion of the jury" (*c*). "And it is of the greatest consequence," observes Lord Hardwicke (*d*), "to the law of England and to the subject, that these powers of the judge and jury are kept distinct . . . and if ever they come to be confounded, it will prove the confusion and destruction of the law of England."

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Some protection is extended to jurors by our law—any libellous imputation upon them when discharging their onerous duties will expose to punishment its author. Cases, it has been observed (*e*), may doubtless happen in which both judge and jury are mistaken or misled; when they are so, the law has afforded a remedy, and the party injured is entitled to pursue every method allowed by law for correcting their mistake. But when a man publicly calumniates the proceedings of a court of justice, the

Commissions for ecclesiastical cases and all other commissions and courts of like nature" to be "illegal and pernicious."

(*b*) Page 114, a.

(*c*) Leg. Max. 6th ed. 96.

(*d*) *R. v. Poole*, Cas. temp. Hardw. 28.

(*e*) *Per Buller, J.*, 2 T. R. 205.

Protection
extended to
jurors.

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obvious tendency thereof is "to weaken the administration of justice, and in consequence to sap the very foundation of the constitution." For such libel a criminal information may be granted (*f*), or filed *ex officio* by the Attorney-General (*g*), or an indictment (*h*) may be preferred. "What is it," asks Sir Vickary Gibbs, Attorney-General (*i*), "that secures the lives, liberties, and property of the people of this country? What but the general respect which is paid to the law, and the general sense which prevails of the purity of the administration of justice?" Therefore, whoever wrongfully asperses its administration, offends against the public, and is punishable.

Importance
of trial by
jury.

And well does the time-honoured institution of trial by jury merit protection from our law, although the question has ere now been mooted whether it be not in our existing social condition superfluous, or perhaps even calculated to impede the administering of justice. Of late innovation has increasingly been made on it, as well by amplifying the powers of summary conviction vested in justices of the peace (*j*), as by enabling judges both of our local (*k*) and of our superior courts in the majority of cases (*l*), to adjudicate alone on causes heard before them. And though it be conceded that legal questions purely

(*f*) *R. v. Watson*, 2 T. R. 199; and see *Ex parte the Duke of Marlborough*, 5 Q. B. 955; 13 L. J., M. C. 105.

(*g*) *R. v. Hart*, 30 St. Tr. 1131; *R. v. White*, 1 Camp. N. P. C. 359, n.; *R. v. Thompson*, 8 St. Tr. 1359.

(*h*) See form of such an indictment, Arch. Cr. Pl. 18th ed. 877.

(*i*) *R. v. White*, 30 St. Tr. 1161.

(*j*) See Broom's Comm. Com. Law, 6th ed. p. 956; and 42 & 43 Vict. c. 49.

(*k*) Broom's Comm. Com. Law, pp. 66—79.

(*l*) 15 & 16 Vict. c. 76, ss. 46 & 47; and 17 & 18 Vict. c. 125, s. 1; repealed by 46 & 47 Vict. c. 49; see now Rules of Supreme Court, 1883, Ord. XXXVI., rr. 2—9.

civil, when complex and difficult, might often be better settled by the court without than with a jury; yet when questions evolved by political agitation are raised between the subject and the Crown (*m*)—questions the solution of which most nearly touches the privileges of the one or the prerogatives of the other—it is conceived that, by the wit of man, no system could be devised more fitted to insure the rights of individuals, and give confidence and stability to the public mind, than that of trial by the country, which has descended to us from our ancestors, and which we in turn, if we rightly appreciate our liberties, ought to transmit to our posterity.

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CASE.
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(*m*) See, for instance, *The Case of the Seven Bishops*, *post*, § 3 (where the functions of the jury at a trial for seditious libel are considered) and authorities cited in the Note thereto.

DARNEL'S CASE, 3 St. Tr. 1.
(3 Car. 1, A.D. 1627.)

THE WRIT OF HABEAS CORPUS—WHEN GRANTED—HOW
IT PROTECTS THE SUBJECT.

A return to a writ of habeas corpus, setting forth that the commitment was by special command of the sovereign, is insufficient.

King Charles I. being engaged in continental wars, which he was resolved to prosecute, and having by a dissolution deprived himself of the prospect of aid from parliament, projected a mode of raising money by forced loans (*n*). To this end letters were sent to the lords-lieutenants of counties, to return the names of persons of ability therein resident, and what sums they could spare; and the comptroller of the king's household issued letters in the king's name, under the privy seal, to several persons returned for the loan-money; some were assessed at 20*l.*, some at 15*l.*, and others at 10*l.* Commissioners were nominated with private instructions how to behave themselves in this affair, and divers lords of the council were appointed to repair into their counties to advance the raising of the loan. Collectors were also appointed to pay into the exchequer the sums received, and to return the names of such as refused to pay, or showed a disposition to delay payment of, the sums imposed. This assessment for a loan did not altogether pass current with the people, for divers persons refused to subscribe or lend at the rate proposed; the non-subscribers of rank in all counties were bound over by recognizances to tender their appearance at the council-board, and divers of them were committed to prison, which caused great murmuring. But from amongst the many

n) 2 Rapin, Hist. Eng. 253, 258; 1 Hall, Const. Hist. 382.

who were imprisoned throughout England for refusing to lend upon the commission of loans, only five brought their *habeas corpus*, viz., Sir Thomas Darnel, Sir John Corbet, Sir Walter Earl, Sir John Heveningham, and Sir Edmund Hampden.

DARNEL'S
CASE.
—

In Michaelmas Term, 3 Car. I., Sir Thomas Darnel ^{Writ.} being imprisoned in the Fleet by virtue of a warrant signed by the King's Attorney-General, upon the 3rd of November, by his counsel, moved the justices of the King's Bench to grant him a writ of *habeas corpus cum causa*; directed to the Warden of the Fleet, to show the cause of his imprisonment, that thereupon the court might determine whether his restraint were legal or illegal. The writ was granted by the court returnable on the 8th of November following, whereupon the Attorney-General gave order for an *alias* (o) upon the *habeas corpus* for Sir Thomas Darnel, returnable on the 15th of November, by virtue of which writ the warden of the Fleet brought Sir Thomas Darnel to the King's Bench, and returned as follows:

“Ego Henricus Liloe miles guardianus prisonæ domini regis de le Fleet serenissimo domino regi certifico quod dictus Thomas Darnel baronettus detentus est in prisonâ prædictâ sub custodiâ meâ virtute cujusdam warranti duorum de privato consilio mihi directi, cujus tenor sequitur in his verbis, viz.:

Return
No. 1.

“Whereas heretofore the body of Sir Thomas Darnel hath been committed to your custody, these are to require you still to continue him; and to let you know that he was and is committed by the special command of his Majesty, &c.

“Et hæc est causa detentionis prædicti, Thomæ Darnel.”

(o) “The method to compel a return to a *habeas corpus*” was “by taking out an *alias* and *pluries*, which if disobeyed an attachment issues of course.” Bacon, Abr. (by Dodd)

vol. iv. pp. 130, 141; or a rule might be made to return the writ, *Id.* But now an attachment will issue without waiting for an *alias* or *pluries*.

DARNEL'S
CASE.

Return
No. 2.

In each of the other cases the return was thus :—

“*Certifico quod—detentus est in prisonâ de le Fleet sub custodiâ meâ prædictâ per speciale mandatum domini regis mihi significatum per warrantum duorum et aliorum de privato concilio perhonorabilissimi dicti domini regis, ejus quidem tenor sequitur in hæc verba.*

“Whereas — was heretofore committed to your custody, these are to will and require you still to detain him, letting you know that both his first commitment and this direction for the continuance of him in prison were and are by his Majesty’s special commandment.

“*Et hæc est causa detentionis,*” &c.

Arguments
for the
prisoners.

The arguments (*p*) against the sufficiency of the above returns were—1st. That either return was bad in form ; 2ndly. That it was bad in substance.

I. It was argued—that either return was defective, as setting forth the cause of detention only, not of the caption.

That the return No. 2 was contradictory ; for in that part of the return before the warrant it is said, *Quod detentus est per speciale mandatum domini regis.* Whereas the warrant of the lords of the council sets forth that they do will and require the keeper still to detain the prisoner, which is contrary to the first part of the return. Besides, the lords themselves say, in another place, that the king commanded them to commit him, and so it is their commitment ; the return is therefore contradictory and void.

That either return was too general, and was uncertain and evasive : (1) As not precisely stating that the detention was by special command of the king, but rather setting forth that it was by such command, signified by the warrant of the lords of the council. And if in pleading there must be direct affirmation of the matter alleged, then *à fortiori* in a return, which must be more precise

(*p*) Of Serjeant Bramston and Messrs. Noy, Selden, and Calthrop.

than a pleading; and this return is no express affirmation of the keeper, that the prisoner is detained in prison by the special command of the king, but only an affirmation of the lords of the council that the detainment in prison was by special command of the king: the return, which ought to be certain and affirmative, not by way of information out of another's mouth, is consequently bad. (2) As not showing how the special command alleged in the return was signified, whether by writ or under seal, or by word of mouth only.

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And if any of these commands be of higher nature than the other, doubtless it is that by writ or under seal, as being of record; yet in that the person may be bailed, and why not in this? Commandments of the king are of several natures, by some of which the imprisonment of a man's body is utterly unlawful: and by others of them, although the imprisonment may be lawful, yet the continuing of it without bail will be unlawful.

1. A verbal command of the king will not be sufficient authority either to imprison a man, or to continue him in prison:—Upon an action of trespass brought for cutting down trees, the defendant pleaded that the place where he cut them was parcel of the manor of D., whereof the king was seised in fee, and the king commanded him to cut the trees. Held, that the plea in bar was ill, because the defendant did not show any special commandment of the king; and it was agreed by the whole court, that if the king command one to arrest another, and the party commanded arrest the other, an action of trespass or false imprisonment is maintainable against the party who arrested, although it were done in the presence of the king (q).

If the king give me a thing, and I take the same by his

(q) Fitzh. Abr. Monstrans de faits, pl. 182; Year Bk. 39 Hen. 6, p. 17, pl. 21.

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commandment by word of mouth, it is not justified by law (r).

2. There is a commandment of the king by his commission, and by virtue of such commandment, the king may neither seize the goods of his subject, nor imprison his body. In one case (s), it was agreed by all the justices, that a commission to take a man's goods or imprison him, without indictment or suit of the party, or other due process, is against the law.

3. A commandment of the king may be grounded upon a suggestion made to the king or to his council; and if a man be committed to prison upon such a suggestion by command of the king it is unlawful.

II. It was argued that the return was insufficient in substance, because there ought to be a cause of imprisonment assigned:—There are other writs by which men are delivered from restraint,—as that *de homine replegiando*; but the writ of *habeas corpus* is the only means the subject has for obtaining his liberty, the end of this writ being to return the cause of the imprisonment, that it may be examined whether the parties ought to be discharged or not: which, however, cannot be done upon this return, for the cause of the first imprisonment is not at all expressed in it.—The cause of the imprisonment should, at the least, be expressed so far, that it may appear to be none of those causes for which by law the subject ought not to be imprisoned; and it ought to be expressed that it was by presentment or indictment, and not upon petition or suggestion made to the king and lords, which is against the stats. 25 Edw. 3, c. 4, and 42 Edw. 3, c. 3.

But it may be objected, that this writ of *habeas corpus* does not demand the cause of the first commitment, but

(r) Year Bk. 37 Hen. 6, p. 10, pl. 20.

“The king, being a body politic, cannot command but by matter of record, for *rex precipit et lex precipit*

are all one, for the king must command by matter of record according to the law.” 2nd Inst. 186.

(s) Lib. Ass. p. 253, pl. 5.

of the detaining only ; and so the writ is satisfied by the return ; for though it show no cause of the first commitment, yet it declares a cause why the prisoner is detained : this is no answer, nor can give any satisfaction ; for the reason why the cause is to be returned, is for the subject's liberty, that if it shall appear a good and sufficient cause the prisoner may be remanded ; if insufficient, he is to be enlarged.—But if this return be held good, then his imprisonment will continue, not for a time only, but for ever ; and the subjects of this kingdom may be restrained of their liberties perpetually, without remedy by law. Therefore this return cannot stand with the laws of the realm, nor with Magna Carta ; nor with the stat. 28 Edw. 3, c. 3—if a man be not bailable upon this return, he cannot have the benefit of these two laws, which are the inheritance of the subject.

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—
Arguments
for the
prisoners.

By Magna Carta, cap. 29, *Nullus liber homo capiatur vel imprisonetur nisi per legem terræ*. And by these words, *per legem terræ*, must be intended by due course of law, *i.e.*, either by presentment or by indictment.

If the meaning of these words, *per legem terræ*, were but “according to the law ;” and *per speciale mandatum*, &c., were within the meaning of these words, “according to the law ;” then this statute had done nothing. The Act says : “No freeman shall be imprisoned but by the law of the land.” If the words *per legem terræ* are to be understood in the first sense, this statute will extend to villeins as well as to freemen ; for if I imprison another man's villein, the villein may have an action of false imprisonment. But the lords and the king (for then they both had villeins) might imprison them, and the villein could have no remedy. But these words in the statute, *per legem terræ*, apply to the freeman, who ought not to be imprisoned, but by due process of law ; and unless the interpretation be this, the freeman will have no privilege above the villein.

Therefore these words, *per legem terræ*, must be here

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CASE,
—
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prisoners.

so interpreted as in 42 Edw. 3, where the bill is worth observing (*t*). It recites that divers persons without any writ or presentment were cast into prison, &c., and prays that it might be enacted, that it should not be so done thereafter. The answer is, that as this is an article of the Great Charter, it should be granted. So that it seems the statute is not taken to be an explanation, but the very words of Magna Carta.

It is an infallible maxim of the law, that as the court ought not to deny a *habeas corpus* unto any prisoner who demands the same, by whomsoever he be committed; so ought the cause of his imprisonment to be shown upon the return, in order that the court may judge whether it be lawful or not.

And further, by all the precedents (*u*) it appears that where the return is either *per mandatum domini regis* or *per mandatum dominorum privati concilii domini regis*, there is also a cause over and besides the *mandatum* returned. As to the objection, that *per mandatum domini regis*, or *privati concilii domini regis*, is a good return, it may be answered:—

1. It is not to be presumed that the king or council would commit one to prison without some offence; and therefore the command of the king or council, though occasioned by the cause, is not itself the cause of commitment.

2. It appears that the jurisdiction of the privy council is a limited jurisdiction, their power being restrained in certain cases by Act of Parliament (*x*). And, their jurisdiction being a limited jurisdiction, the cause and grounds of their commitment ought to appear, whereby it may be seen whether the lords of the council did commit for such a cause as was within their jurisdiction; for if they did command me to be committed to prison for a cause whereof

(*t*) *Post*, p. 179.

et seq.

(*u*) Which are enumerated in the argument of Mr. Selden, *post*, p. 185

(*x*) 4 Inst. 56.

they had not jurisdiction, the court ought to discharge me of this imprisonment. And since *nihil aliud potest rex in terris nisi id solum quod de jure potest* (y), it ought to appear upon what cause the king has committed one to prison; whereby the judges, who are indifferent between the king and his subjects, may judge whether his commitment be against the laws and statutes of the realm, or not.

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3. It is to be observed that the king's command by his writ of *habeas corpus* is since the king's command for commitment of the prisoner; and, being the later commandment, ought to be obeyed; and since it commands a return of the body *cum causâ detentionis*, there ought to be a return of some other cause than *per mandatum domini regis*. Therefore the return that the prisoner was committed and detained in prison *per speciale mandatum domini regis*, without showing the nature of the command, by which the court may judge whether it be of such a nature that he ought to be detained in prison, and without showing the cause upon which the command is grounded, is not good.

Lastly, admitting that the first commitment of the prisoner by command of the king were lawful; yet when he has continued in prison for such reasonable time as may be thought fit for that offence for which he is committed, he ought to be brought to answer.—For it appears that liberty is a thing so favoured, that the law will not suffer the continuance of a man in prison for any longer time than is necessary; and therefore the law will neither suffer the party, sheriffs, or judges to continue a man in prison by their power and their pleasure, but doth speed the delivery of a man out of prison, with as reasonable expedition as may be.

For the Crown it was argued as follows (z):—

(y) Bracton, lib. iii. cap. 9, fo. 197.

as to whom see Foss, Judges of Eng., vol. vi. p. 320.

(z) By Sir Robert Heath, Att.-Gen.,

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That the return was positive and affirmative.

The words are *Quod detentus est sub custodia meâ per speciale mandatum domini regis*: the other words, *mihi significatum*, follow after, but are not part of the affirmation made before. But, if the construction contended for be correct, the words must be turned thus:—*Quod testificatum*, or *significatum est mihi per dominos privati concilii quod detentus est per speciale mandatum domini regis*: and then indeed it had not been the proper return of the keeper, but the signification of the lords of the council: the turning of the sentence will resolve this point. Here is a positive return, that the detaining is by the command of the king; and the rest is rather for satisfaction to the Attorney-General and the court, than any part of the return.

Another objection is that the keeper has returned the cause of the cause, and not the cause itself, wherein the counsel for the prisoners are mistaken; for the return is affirmative, *Ego Johannes Liloe certifico, &c.* Admitting that among logicians there are two causes, *causa causans*, and *causa causata*: the *causa causans* in this case is not the warrant from the lords of the council, for that is *causa causata*: but *speciale mandatum domini regis*: the other is but the council's signification or warrant for him that made the return.

Then as to the objection, that the return is imperfect, because it shows only the cause of the detaining, and not the cause of the first commitment. The writ itself clears the objection; for it is to have the party mentioned in it, and the cause of his detention, returned into court; therefore the answer is sufficient. The warden of the Fleet had indeed dealt prudently, if he had only said that the prisoners were detained *per speciale mandatum domini regis*: but because, if he should make a false return, he would be liable to an action, he did discreetly to have the certification of the lords of the council. Whatsoever the cause be that is returned, the court must not doubt of the

truth of the return, though the officer making it is liable to an action if the return be false ; therefore the keeper of the prison did wisely to show from whom he had the warrant, and so to show whether the cause were true or not.

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As to the objection, that the return is contradictory in itself :—The whole warrant read together shows that the lords of the council speak not their own words or command therein, but say that the court is to take notice of it as the words and command of the king. The lords of the council, as servants of the king, signify his Majesty's pleasure—that the court may know that the first commitment and this present detention in prison are by his Majesty's special command.

Touching the matter of the return, the main point is whether the prisoners are bailable or not ; the principal reason insisted upon being the inconvenience which would ensue to the liberties of the subject, if this return were held good. Admitting that the liberty of the subject is his inheritance, yet it is his inheritance *secundum legem terræ*. The king is the head of the same fountain of justice, which this court administers to all his subjects ; all justice is derived from him, and what he does, he does not as a private person, but as the head of the commonwealth, as *justiciarius regni* ; and shall not we, not as subjects only, but as lawyers, who govern themselves by the rules of the law, submit to his commands ? shall we inquire whether they be lawful, and say that the king does not this or that in course of justice ?

If this court proceed according to justice, who can call its actions in question, unless there be error in the proceeding ; And who shall call in question the actions or the justice of the king ?—as in this case, when he commits a subject, and shows no cause for it.

If the king commits *per speciale mandatum domini regis*, or *pro certis causis ipsum dominum regem moventibus*, or if the commitment be *certis de causis ipsum*

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dominum regem tangentibus, shall it not be good? Unless the return open the secrets of the commitment, the court cannot judge whether the party ought by law to be remanded or delivered: and therefore if the king allow those who make the return, to express the cause of the commitment,—as for suspicion of felony, this court in its jurisdiction can try these cases, and proceed in them although the commitment be *per speciale mandatum domini regis*, for with the warrant is sent the cause of the commitment, so that the court may proceed; but if there be no cause of commitment expressed, this court always remands the prisoner; for it is to be intended a matter of state, and that it is not ripe nor timely for it to appear.

The main grounds of argument in this case rest on Magna Carta, chap. 29, which declares that no freeman can be imprisoned but *per legale iudicium parium suorum aut per legem terre*. Is it then to be understood that no man should be committed unless first he be indicted or presented? Certainly there is no justice of peace in a county, nor constable within a town, but may commit before an indictment drawn or presentment made: what then is meant by these words, *per legem terre*? unless that the king may for reasons moving him commit a man, and not be answerable for it,—neither to the party, nor to any court of justice.

Then, as to the question whether if the king or the lords of the council commit a man, and show no cause for the commitment, the ordinary courts of justice have power to bail him or no; for that we insist upon the Statute of Westminster I., the scope whereof is to direct us in what cases men imprisoned are to be bailed. It was meant especially for direction to sheriffs and others; yet courts of justice are not excluded from the operation of this statute (a).

(a) As to this stat. of Westminster I, see arg. of Mr. Littleton, *post*, p. 180.

A person committed *per speciale mandatum domini regis* may be innocent, whereupon he brings a *habeas corpus*, and by virtue of that writ is brought hither; will the court think it fit or convenient to bail him, where the accusation against him must come from beyond seas? The court will rather believe that the commitment was for a cause, than inquire further of it. Peradventure some great misdemeanor may be committed, some of the parties may make away, some may be taken; is it fit that they who are in prison should be tried before the principals be taken?

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There are prisoners in the Tower at present who were put in there when very young; if they were to bring a *habeas corpus*, having been imprisoned for state matters, would this court deliver them? It may be divers persons suffer wrongfully in prison, but shall all prisoners, therefore, be delivered? That were a great mischief.

No doubt but the king's power is absolute over his coin (*b*); if then he command that it be turned to brass or leather, it were inconvenient; but could this court hinder it, as being an inconvenience, if he would do it? The Cinque Ports are free for traffic for all subjects; but if the king in his cabinet understand that there is danger of war, he thereupon shuts the ports, so that no man can go out: shall the merchant say that this is injustice in the king (*c*)? By our book-cases it appears what our king may do, and nothing can be said against it, but that he will not do it; the king may pardon all traitors and felons (*d*), and if he should do so, may not his subjects say, if the king do this, the bad will overcome the good? But shall any one say, the king cannot do this? No, we may only say, he will not do it.

The king may exempt men from the office of sheriff; is not this inconvenient (*e*)? And may it not be said, if he

(*b*) As to this prerogative of the Crown, see 2 Steph. Com. 522.

(*c*) 2 Steph. Com. 500.

(*d*) 2. Steph. Com. 507.

(*e*) As to the mode of appointing sheriffs, see 2 Steph. Com. 627;

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exempt ten in each shire, the burthen of the county may rest upon the meaner sort of people? Can any man say more to this than that the king will not do it? Inheritances are to be decided upon trial; the king may exempt private men from being of a jury; but if he exempts all men, who shall try our causes? It is to be presumed, that the king will not do it.

By Magna Carta, no man shall be put out of his freehold, &c. But if the king will do it, must not the party that is so put out go to the king by petition? and though the petition be of right, yet when such a petition comes to the king, must it not be answered with these words, *soit droit fait al parte*? And when the king gives that warrant for it, right will be done, but not before.

Lastly, in answer to the fear expressed that the power now contended for, as inherent in the Crown, may be a source of danger, the words of Bracton (*f*), who wrote not to flatter the present age, may be cited. Speaking of a writ for wrong done by the king to the subject touching land, he says:—*Si iudicium a rege testatur (cum breve non currat contra ipsum) locus erat supplicationi quod factum suum corrigat et emendet, quod quidem si non fecerit, satis sufficit ei ad pœnam quod Dominum expectet ultorem, nemo quidem de factis suis præsumat disputare, multo fortius contra factum suum venire.*

The judgment.

Sir Nicholas Hyde, C. J. (*g*), delivering judgment on the sufficiency of the above returns to the writs of *habeas corpus*, observed, *inter alia*, as follows:—This is a case of great weight and expectation, and God forbid we should sit here but to do justice to all men according to our best skill and knowledge, for it is according to our oath and duty so to do. We are sworn to maintain all prerogatives of the king; and we are likewise sworn to administer

Chitty, Prerog. Cr. 78; and 44 and 45 Vict. c. 68, s. 16.

(*f*) See Rac. Abr. (by Dodd), vol.

vi. p. 474.

(*g*) As to whom see Foss, Judges of Eng., vol. vi. p. 335.

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justice equally to all people (*h*). That which is now to be judged by us is—whether one committed by the king's authority, no cause of commitment being set forth, ought to be delivered on bail, or remanded to prison. We can take notice only of the return; and when the case appears to us no otherwise than by it, we are not bound to examine the truth of the return, but the sufficiency of it, and there is a great difference between the sufficiency and the truth.

We cannot judge upon rumours nor reports, but must judge upon that which is before us on record; therefore the return is examinable by us, whether it be sufficient or not.

The exceptions which have been taken to this return were two: the one for the form, the other for the substance.

For the form, it is not, as is said, positive and absolute, that the prisoners were committed by the king, but as it appears by a warrant from the lords of the council, and thus there seems to be a contradiction in the return.

Now we conceive that this is a positive and an absolute return: the keeper first returns that the prisoners are detained by the special command of the king, and there follows, that this was signified to him by the lords of the council. This is returned to show us that we should not doubt the verity of the return; and not to show that the keeper has no knowledge of the cause but by the signification of the lords of the council.

If the warden of the Fleet had returned, that the lords of the council had signified to him that his prisoner was detained by the king's command, that had been sufficient; inasmuch, however, as he first returns that the commitment was by the king's direction, though he afterwards sets forth that which might have been omitted, the return is good and positive.

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Then as to the objection that no cause of caption is assigned in the return. There is not one word in the writ demanding why the prisoners were taken: it asks only why they are detained, so that the writ is sufficiently answered; and though sometimes it be necessary that the cause of the caption should be certified, yet sometimes it is superfluous: in this case the cause of the detention is sufficiently answered, which is the demand of the writ, and therefore we resolve that the form of this return is good.

The next question is, whether the substance or matter of the return be good or no. The warden certifies that the prisoners are detained in prison by the special command of the king; is this good in law or not?

The counsel for the prisoners have concluded, that when the king has committed one, and expressed not the cause, the court has delivered the party; but the contrary is settled in every case which has been put: where the cause of commitment has been expressed, there the party has been delivered by the court, if the case so required; but, where there has been no cause expressed, the prisoner has ever been remanded; or, if delivered, he has been so by the king's direction, or by the lords of the council. This appears by the precedents and records (*i*). If in justice we ought to deliver the prisoners, we would do it; but upon these grounds, and these records, precedents, and resolutions, we cannot deliver them, but they must be remanded.

Proceedings
in parliament
relating to the
liberty of
the subject.

So the prisoners were remanded accordingly, and continued in custody till the 29th of January following, when the king in council ordered them to be released; and writs being issued about this time for electing members of parliament, to meet March 17th, 1627-8, those who suffered for the loan were elected in many places. On the 17th of March the house met, and the grievances

(i) Which are cited in Mr. Selden's argument, *post*, p. 189 *et seq.*

of forced loans, the imprisoning of persons for refusing to contribute thereto, and the remand of Sir Thomas Darnel and others, as above set forth, having been vehemently discussed, the House of Commons at length came to the following resolutions :—

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I. "That no freeman ought to be detained or kept in prison or otherwise restrained by the command of the king or privy council, or any other, unless some cause of the commitment, detainer, or restraint, be expressed, for which by law he ought to be committed, detained, or restrained.

Resolutions
of the
House of
Commons.

II. "That the writ of *habeas corpus* may not be denied, but ought to be granted to every man that is committed or detained in prison, or otherwise restrained, though it be by the command of the king, the privy council, or any other, he praying the same.

III. "That if a freeman be committed or detained in prison, or otherwise restrained by the command of the king, the privy council, or any other, no cause of such commitment, detainer, or restraint, being expressed, for which by law he ought to be committed, detained, or restrained, and the same be returned upon a *habeas corpus*, granted for the said party; then he ought to be delivered or bailed."

The foregoing resolutions having been transmitted to the lords for their concurrence, a conference between the two houses thereupon took place. This conference was managed on behalf of the commons by four members—Sir Dudley Digges and Mr. Littleton (*k*), Mr. Selden and Sir E. Coke; to each of whom was entrusted a distinct line of argument in support of the resolutions of the house.

Conference
with the
Lords.

I. To Sir Dudley Digges was assigned the task of introducing the matter, and showing that the liberty of the subject is founded in the common law. He argued

Arguments
in support
of resolu-
tions.

(*k*) As to whom see 6 Foss, Judges of Eng., 301, 343.

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Introductory
argument of Sir
Dudley
Digges.

thus:—The laws of England are grounded on reason, more ancient than books, consisting much in unwritten customs, yet so full of justice and true equity, that our ancestors many times propugned them with a *nolumus mutari*; and so ancient that from the Saxon days, notwithstanding the injuries and ruins of time, they have continued in most parts the same, as may appear in old remaining monuments of the laws of Ethelbert, the first Christian king of Kent; Ina, the king of the West Saxons; Offa, of the Mercians; and Alfred. And though the Book of Litchfield, speaking of the troublesome times of the Danes, says that then *Jus sopitum erat in regno, leges et consuetudines sopitæ sunt, and prava voluntas, vis, et violentia magis regnabant quam judicia vel justitia*; yet, by the blessing of God, King Edward, commonly called St. Edward, did awaken those laws, and as the old words are, *Excitatas reparavit, reparatas decoravit, decoratas confirmavit*. Which word, *confirmavit*, shows that good King Edward did not give those laws, which William the Conqueror and all his successors since that time have sworn unto.

And here it might be demonstrated that our laws and customs are the same in many particulars with those of the Saxon kings. As we have now, even in those Saxon times they had, their courts baron, and courts leet, and sheriffs' courts; and Fortescue, the learned chancellor to Hen. VI., writing of this kingdom, says, *Regnum illud in omnibus nationum et regum temporibus, eisdem, quibus nunc regitur, legibus et consuetudinibus regebatur*. And as the poet said of fame, may be said of our common law: *Ingrediturque solo, caput inter nubila condit*. But for a more certain argument:—It is an undoubted and fundamental point of this so ancient common law of England, that the subject has a true property in his goods and possessions. But the undoubted birthright of free subjects has lately not a little been invaded and prejudiced by pressures, the more grievous because they have been

followed by imprisonment, contrary to the franchises of this land; and when, according to the laws and statutes of the realm, redress has been sought for in a legal way, by demanding *habeas corpus* from the judges, and a discharge or trial according to the law of the land, success has failed: which now enforces the commons to examine, by Acts of Parliament, precedents, and reasons, the truth of the English subject's liberty.

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CASE.
—
Argument of
Sir Dudley
Digges.

II. To Mr. Littleton was assigned the task of citing Acts of Parliament, and expounding out of them the right of personal liberty. He argued thus:—The personal liberty of the subject now in question is established and confirmed by the whole state, the king, the lords spiritual and temporal, and commons, by several Acts of Parliament; the authority whereof is so great that it can receive no answer, save by interpretation or repeal.

Argument
founded on
the statutes.

The first of these is the Grand Charter of the liberties of England, first granted in the 17th of King John, and renewed in the 9 Hen. III., and since confirmed in parliament above thirty times (l). The words are (m), *Nullus liber homo capiatur, vel imprisonetur, aut disseisietur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlageretur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terræ.*

The above words are express enough, yet it is remarkable that Matthew Paris, an author of special credit, observes that the charter of 9 Hen. III. was the very same as that of 17 John; *in nullo dissimilis*, are his words (n). That of King John he sets down *verbatim* (o), and there the words are directly, *Nec eum in carcerem*

(l) *Ante*, p. 58, n. (y).

(m) Cap. 29.

(n) Matthew Paris, ed. 1640, p.

321. His words are, *Chartæ utro-*

rumque regum in nullo inveniuntur dissimiles.

(o) Page 258.

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mittemus: and such a corruption as is now in print might easily happen betwixt 9 Hen. III. and 28 Edw. I., when this charter was first exemplified, but certainly there is sufficient left in that which is extant to decide this question. For the words are, "That no freeman shall be taken or imprisoned, but by the lawful judgment of his peers;" which is by a jury of peers, ordinary jurors, or others, who are their peers, or by the law of the land: which words, "law of the land," must of necessity be understood to be by due process of law, not the law of the land generally, or otherwise it would comprehend bondmen (whom we call villeins), who are excluded by the word, *liber*; for the general law of the land allows their lords to imprison them at pleasure without cause; wherein they differ from freemen, who cannot be imprisoned without a cause. And that this is the true understanding of the words, *per legem terræ*, will plainly appear, by divers other statutes which expound the law accordingly. And though the words of the Grand Charter be spoken in the third person, yet they are not to be understood of suits betwixt party and party, at least not of them alone, but even of the king's suits against his subjects, as will appear by the occasion of getting of that charter, which was by reason of the differences betwixt those kings and their people, and therefore properly to be applied unto their power over them, and not to ordinary questions betwixt subject and subject.

The words, *per legale judicium parium suorum*, immediately preceding *per legem terræ*, are meant of trials at the king's suit and not at the prosecution of a subject. And, therefore, if a peer of the realm be arraigned at the suit of the king, upon an indictment of murder, he shall be tried by his peers; but if he be appealed of murder by a subject, his trial shall be by an ordinary jury of twelve freeholders (*p*): therefore as *per judicium parium suorum*

(*p*) Bro. Abr. Trials, pl. 142; Staunf. Coron., lib. iii., cap. 1, fo. 152.

extends to the king's suit, so shall these words, *per legem terræ*.

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And in 8 Edw. II. (q) there is a petition setting forth that a writ under the privy seal had issued to the keepers of the great seal, to cause lands to be seized into the king's hands, by force of which there went a writ out of chancery to seize, against the form of the Grand Charter, and the party was restored to his land: which showed the statute extended to the king.

There was no invasion upon this personal liberty till the time of Edw. III., which was soon resented by the subject: for stat. 5 Edw. 3, c. 9, enacts that "no man from henceforth shall be attached by any accusation, nor forejudged of life or limb, nor his lands, tenements, goods, nor chattels, seized into the king's hands, against the form of the Great Charter and the law of the land." The stat. 25 Edw. 3, c. 4, is more full, and expounds the words of the Grand Charter thus:—"Whereas it is contained in the Grand Charter of the franchises of England, that no freeman shall be imprisoned, nor put out of his freehold, nor free custom, unless it be by the law of the land; it is awarded, assented, and established, that from hence none shall be taken by petition or suggestion, made to our lord the king, or to his council, unless it be by indictment, or presentment of his good and lawful people of the same neighbourhood; which such deeds shall be done in due manner, or by process made by writ original at the common law, nor that none be ousted of his franchises, nor of his freehold, unless he be duly brought in to answer, and forejudged of the same by the course of the law; and if anything be done against the same it shall be redressed and holden for naught."

As to this statute, it is observable that what in Magna Carta and the preamble of the statute is termed "by the law of the land," is in the body of the Act expounded to

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be by process made by writ original at common law, which is a plain interpretation of the words, "law of the land," in the Grand Charter.

The stat. 28 Edw. 3, c. 3, is very full and significant; "That no man, of what state or condition soever he be, shall be put out of his lands or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without he be brought in to answer by due process of law." Here the words, "law of the land," are rendered by due process of the law.

In 36 Edw. III. (r), amongst the petitions of the commons, one is thus: that "the Great Charter, and the Charter of the Forest, and other statutes made in his time, and the time of his progenitors, for the profit of him and his commonalty, be well and firmly kept; and put in due execution, without putting disturbance, or making arrest contrary to them by special command, or in other manner."

The answer to the petition, which makes it an Act of Parliament, is, "Our lord the king, by the assent of the prelates, dukes, earls, barons, and the commonalty, hath ordained and established that the said charters and statutes be held and put in execution according to the said petition." It is observable, that the statutes were to be put in execution according to the said petition, which is, that no arrest should be made contrary to the statutes by special command. This concludes the question, and is of as great force as if it were printed, for the Parliament Roll is the true warrant of an Act, and many are omitted out of the books that are extant in the roll.

In 36 Edw. III. (s), there is a petition as follows:—"Whereas it is contained in the Grand Charter and other statutes, that no man be taken or imprisoned by special command, without indictment, or other due process to be made by the law, and oftentimes it hath been, and yet is,

many are hindered, taken and imprisoned without indictment, or other process made by the law upon them, as well of things done out of the forest of the king as for other things; that it would therefore please our said lord to command those to be delivered which are so taken by special command against the form of the charter and statutes as aforesaid."

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The answer is, "The king is pleased, that if any man find himself grieved, he come and make his complaint, and right shall be done unto him." The stat. 37 Edw. 3, c. 18, agrees in substance with the foregoing: it says, "Though it be contained in the Great Charter that no man be taken nor imprisoned nor put out of his freehold without process of the law; nevertheless divers people make false suggestions to the king himself, as well for malice as otherwise; whereat the king is often grieved, and divers of the realm put in damage, against the form of the same charter; wherefore it is ordained that all they which make such suggestions shall be sent with the same suggestions to the chancellor, treasurer, and his grand council, and that they there find surety to pursue their suggestions, and incur the same pain that the other should have had, if he were attainted, in case that the suggestion be found evil: and that then process of law be made against them without being taken or imprisoned, against the form of the said charter and other statutes." Here the law of the land in the Grand Charter is explained to be without process of law.

In the Parliament Roll (*t*), where the petition and answer, which make the Act (*u*), are set down at large, the petition states:—

"Because many of your commons are hurt and destroyed by false accusers, who make their accusations more for their revenge and particular gain, than for the profit of the king, or of his people: and of those that

(*t*) 42 Edw. 3; Rot. 12, vol. ii. p. 295.

(*u*) Stat. 42 Edw. 3, c. 3.

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are accused by them, some have been taken, and others are made to come before the king's council by writ, or other commandment of the king, upon grievous pains, contrary to the law : That it would please our lord the king, and his good council, for the just government of his people, to ordain, that, if hereafter any accuser propose any matter for the profit of the king, the same matter be sent to the justices of the one bench or of the other, or the Assizes, to be inquired and determined according to the law ; and if it concern the accuser or party, that he have his suit at the common law ; and that no man be put to answer without presentment before the justices or matter of record, or by due process and original writ, according to the ancient law of the land. And if any thing henceforward be done to the contrary, that it be void in law, and held for error."

Here by due process and original writ, according to the ancient law of the land, is meant the same thing, as *per legem terræ*, in Magna Carta ; and the abuse was, they were put to answer by the commandment of the king.

And to the above petition the king's answer is thus :—

"Because this article is an article of the Grand Charter, the king willeth that this be done, as the petition doth demand," whence it appears that by *per legem terræ*, in Magna Carta, is meant by due process of law.

But the statute of Westminster I. c. 15 (*x*) is urged to disprove the opinion above advanced, where it is expressly said, That a man is not replevable, who is committed by command of the king ; therefore the command of the king, without any cause shown, is sufficient to commit a man to prison. The words of the statute are :

"And forasmuch as sheriffs and others, which have taken and kept in prison persons detected of felony, and oftentimes have let out by replevin such as were not replevable, and have kept in prison such as were re-

pleviable, because they would gain of the one party, and grieve the other; and forasmuch as before this time it was not certainly determined what persons were repleviable, and what not, but only those that were taken for the death of a man, or by the commandment of the king, or of his justices, or for the forest: it is provided, and by the king commanded, that such prisoners as were before outlawed, and they which had abjured the realm, &c., shall be in no wise repleviable by the common writ, nor without writ.”

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But by the same statute such as be indicted of larceny by inquests taken before sheriffs or bailiffs by their office, &c., shall from henceforth be let out by sufficient surety. And if the sheriff, or any other, let any go at large, by surety that are not repleviable, he shall be punished as specified in the Act; and if any man withhold prisoners repleviable, after they have offered sufficient surety, he shall pay a grievous amercement to the king; and if he take any reward for the deliverance of such, he shall pay double to the prisoner, and also shall pay a grievous amercement to the king.

It must be acknowledged, that a man taken by commandment of the king is not repleviable, for so are the express words of this statute: but the House of Commons say not, the sheriff may replevy such an one by sureties, *scilicet manucaptors*, but that he is bailable by the king's court of justice: and there is a difference between “repleviable,” which is always by the sheriff upon pledges or sureties given, and “bailable,” which is by a court of record, where the prisoner is delivered to his bail, and they are his gaolers, and may imprison him, and shall suffer for him body for body. If, moreover, the words of the statute themselves be observed, it will appear plainly, that it extends to the sheriff and other inferior officers, but does not bind the judges.

The preamble says: “Forasmuch as sheriffs and others have taken and kept in prison persons detected of felony.”

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If the judges are included, they must be comprehended under the general word "others;" which does not, however, extend to persons of a higher rank, but to inferiors, for the best is first to be named. *Ex. gr.*, the stat. 13 Eliz. c. 10, which begins with colleges, deans and chapters, parsons, vicars, and concludes with these words, "and others having spiritual promotions," shall not comprehend bishops who are of high degree (*y*).

And this is explained in the same statute towards the end, where it enumerates those who were meant by the word "others," viz., under-sheriffs, constables, bailiffs, &c.

Again, the words are, "Sheriffs and others which have taken and kept in prison." Now judges do neither arrest, nor keep men in prison; that is the office of sheriffs and other inferior ministers. Therefore this statute meant such only, and not judges.

The words are further, "That they let out by replevin such as were not repleviable;" that is the proper language for a sheriff; and in the body of the statute it is enacted that such as are there mentioned shall in nowise be repleviable by the common writ, *i.e.*, *de homine replegiando*, which is directed to the sheriff, nor without writ, *i.e.*, by the sheriff *ex officio*. But the command of the justices, who derive their authority from the Crown, is equal as to this purpose with the command of the king. And therefore, by all reasonable construction, it must needs relate to officers that are subordinate to both, as sheriffs, under-sheriffs, bailiffs, constables, and the like. And it were a harsh exposition to say, that the justices might not discharge their own command; and that this was meant of the sheriff and other ministers of justice, appears by the recital, 27 Edw. 1, c. 3, and likewise by Fleta (*z*), who, speaking of towns and hundred courts, sets down the charges that are there to be inquired

(*y*) *Archbishop of Canterbury's* 600.

Case, 2 Rep. 46; Leg. Max. 6th ed.

(*z*) Lib. ii. cap. 52.

of; amongst which is *de replegiabilibus injustè detentis et irreplegiabilibus dimissis*, which cannot be meant of not bailing by the justices; for what have the inferior courts in the country to do with the acts of the justices?

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And to make that more plain, he sets down in the same chapter (a), which concerns sheriffs only, the very statute of Westminster I., and his preface to the statute plainly shows that he understood it of replevin by sheriffs; for he says, *Qui debent per plegios dimitti, qui non, declarat hoc statutum*; and *per plegios* is before the sheriff.

But for direct authority;—Newton, C. J., says (b): “It cannot be intended that the sheriff did suffer him to go at large by mainprize; for where one is taken by the writ of the king, or the commandment of the king, he is irrepleviable; but in such case his friends may come to the justices from him if he be arrested, and purchase a *supersedeas*.” This judge concludes, that the sheriff cannot deliver him that is taken by the command of the king; because he is irrepleviable, which is the very word of the statute: but his friends may come to the justices and purchase a *supersedeas*. So he declares that the sheriff had no power, but the justices had power, to deliver one committed by the king’s command, and both the ancient and modern practice manifests as much: for it is every day’s experience, that the justices of the King’s Bench do bail for murder, and for offences done in the forest, which they could not do, if the word “irrepleviable,” in Westminster I., were meant of the justices, as well as of the sheriffs.

The authorities offered to prove the contrary are in number three.

1. The first, which is not an Act of Parliament, but a resolution in parliament upon an action there brought,

(a) Lib. ii. cap. 52, s. 40.

(b) Year Bk. 22 Hen. 6, p. 46.

pl. 34. Sir Richard Newton was

created chief justice of the Court of Common Pleas, A.D. 1438. See Foss, Judges of Eng., vol. iv. p. 347.

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which was usual in those times, in the case of Stephen Rabaz (c), sheriff of the counties of Leicester and Warwick, who was questioned, for that he had let at large by surety, amongst others, one William, the son of Walter la Persone, against the will and command of the king, whereas the king had commanded him by letters under the privy seal, that he should do no favour to any man who was committed by the Earl of Warwick as that man was; whereunto the sheriff answered, that he did it at the request of some of the king's household upon their letters; and because the sheriff did acknowledge the receipt of the king's letters, thereupon he was committed to prison according to the form of the statute.

To this it may be answered, the sheriff was justly punished, because he is expressly bound by the statute of Westminster I.; but this is no proof that the judges had not power to bail this man.

2. Robert Poynings, Esq., was brought to the bar upon a *capias* (d), and was returned, that he was committed *per duos de concilio*, (which, perhaps, is misprinted for *duos de concilio*, i.e., *dominos de concilio*,) *pro diversis causis regem tangentibus*. And he made an attorney there in an action, whence it is inferred, that the return was good, and the party could not be delivered.

To this the answer is plain: no opinion is here delivered one way or other, upon the return, neither is it stated whether he were delivered, or bailed, or not. Also it appears expressly, that he was brought thither to be charged in an action of debt, at another man's suit; no desire of his own appears to be delivered, or bailed; therefore, if he were remanded, it is no way material to the question in hand.

3. But that which is most relied upon, is the opinion of Stamford (e), where he recites the statute of West-

(c) 21 Edw. 1; Rot. Parl., vol. i.
p. 95.

(e) Staundforde, Pleas Cr., lib. ii.
cap. 18.

(d) Year Bk. 33 Hen. 6, 28. b., 29.

minster I. c. 15, and says: "By this statute it appears, that in four cases at the common law a man was not replevable; to wit, those that were taken for the death of a man, by the command of the king, or his justices, or for the forest;" thus far he is most right. Then he goes on thus: "As to the command of the king, that is meant of the command of his own mouth, or his council, which is incorporated unto him and speak with his mouth, or otherwise every writ or *capias* to take a man, which is the king's command, would be as much, and yet the defendant in such cases is replevable by the common law; and as to the command of the justices, by that is meant their absolute command, for if it be by their ordinary commandment, he is replevable by the sheriff, unless in some cases prohibited by statute."

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The answer to this is, that Stamford says nothing as to whether a man may be committed without cause by the king's command, or whether the judges ought not to bail him in such cases; he says only that such a one is not replevable. And in order that no man might think he meant any such thing he concludes the whole sentence touching the command of the king and the justices thus—that one committed by the ordinary command of the justice is replevable by the sheriff; at least it appears not that he meant that a man, committed by the king or by the privy council without cause, should not be bailable by the justices, and he has given no opinion as to this case; what he would have said, if he had been asked the question, cannot be known, neither does it appear that, by anything that he has said, he meant any such thing as would be inferred out of him. So the declaration of the commons respecting the right of personal liberty is an ancient and undoubted truth, fortified with seven Acts of Parliament, and not opposed by any statute or authority of law whatsoever.

III. To Mr. Selden was assigned the task of vindicating the right of personal liberty by reference to prece-

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dents (*f*) and records. He argued thus:—In the examination of questions of law of right, besides Acts of Parliament, there are commonly used former judgments or precedents. Precedents are good *media*, or proofs of illustration or confirmation, where they agree with the express law: but they can never be proof enough to overthrow any one law, much less seven Acts of Parliament. The House of Commons, therefore, taking into consideration that in this question, being of so high a nature, the several ways of just examination of the truth should be used, have informed themselves of all former judgments and precedents concerning this great point, and have been no less careful of the due preservation of his Majesty's just prerogative than of their own rights. The precedents are of two kinds, either merely matter of record, or resolutions of the judges, after solemn debate upon the point.

A key for the opening and due apprehension of precedents of record, without which no man, unless he be versed in the entries and course of the King's Bench, can understand them, is this:—In all cases where any right or liberty belongs to the subject, by any positive law written or unwritten, if there were not also a remedy by law for the enjoying or regaining this right or liberty, when it is violated or taken from him, the positive law were most vain, and to no purpose; and it were to no purpose for a man to have any right in land or other inheritance, if there were not a known remedy, that is, an action or writ, by which, in some court of ordinary justice, he might recover it. And in this case of right or

(*f*) The argument drawn from judicial precedents, says Sir E. Coke (3 St. Tr. 128), "*is argumentum ab auctoritate, and argumentum ab auctoritate valet affirmativè*: that is, I conceive, though it be no good argument to say negatively, the judges have given no opinion in the point;

ergo, that is not law: yet affirmatively it concludes well: the judges have clearly delivered their opinions in the point, *ergo*, it is good law; which I fortify with a strong axiom, *Neminem oportet sapientiores esse legibus*, as long as these laws stand unrepealed."

liberty of person, if there were not a remedy in law for regaining it, when it is restrained, it were of no purpose to speak of laws, ordaining that it should not be restrained. Therefore in this case shall first be shown the remedy that every freeman is to use for the regaining of his liberty, when he is against law imprisoned, that so upon the legal course and form to be held in using that remedy, the precedents or judgments upon it (for all judgments of record rise out of this remedy) may be easily understood.

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There are in law divers remedies for enlarging a free-man imprisoned, as the writs of *odio et atia* and of *homine replegiando*, besides the common writ of *habeas corpus*, or *corpus cum causâ*, as it is also called. The first two writs which are directed to the sheriff of the county, and lie in particular cases, concern not the present question. But the writ of *habeas corpus*, or *corpus cum causâ*, is the highest remedy in law for any man imprisoned, and the only remedy for him imprisoned by special command of the king, or of the lords of the privy council, without showing cause of the commitment: neither is there in the law any such thing, nor was there ever mention of any such thing in the laws of this land, as a petition of right to be used in such cases for liberty of the person, nor is there any legal course for enlargement to be taken in such cases; howsoever the contrary has upon no ground or colour of law been pretended. If any man be imprisoned by any such command, or otherwise, in any prison whatsoever in England, and desire, by himself or any other in his behalf, this writ of *habeas corpus*, the writ is to be granted to him, and cannot be denied. It is directed to the keeper of the prison, in whose custody the prisoner remains, commanding him that, after a certain day, he bring in the body of the prisoner, *ad subjiciendum et recipiendum juxta quod curia consideraverit, &c.*, *unâ cum causâ captionis et detentionis*; and oftentimes *unâ cum causâ detentionis* only, *captionis* being omitted.

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The keeper of the prison thereupon returns by what warrant he detains the prisoner, and, with his return filed to the writ, brings the prisoner to the bar at the time appointed; when the return is thus made the court judges of its sufficiency or insufficiency, only out of the body of it, without having respect unto any other thing: that is, they suppose the return to be true, whatsoever it be: if it be false, the prisoner may have his action on the case against the gaoler. When the prisoner comes thus to the bar, if he desire to be bailed, and the court upon view of the return think him in law bailable, he is first taken from the keeper of the prison, who brings him up, and is committed to the marshal of the King's Bench, and afterwards bailed, and the entry is, *committitur marescallo et postea traditur in ballium*; for the court never bails any man until he first become their own prisoner, and be *in custodiâ marescalli* of that court. But if upon the return of the *habeas corpus*, it appear to the court that the prisoner ought not to be bailed, nor discharged from the prison whence he is brought, then he is remanded, or sent back there to continue until by course of law he be delivered; and the entry in this case is, *remittitur quousque secundum legem deliberatus fuerit*, or *remittitur quousque*, &c., which is the highest award or judgment that ever was or can be given upon a *habeas corpus*. If, however, the judges doubt whether in law they ought to take the prisoner from the prison whence he came, or give a day to the sheriff to amend his writ, as often they do, then the remand is only during the time of their doubt, or until the sheriff hath amended his return, and the entry thereupon is *remittitur* only, or *remittitur prisonæ prædictæ*, without more. And so *remittitur* generally is of far less moment in the award upon the *habeas corpus* than *remittitur quousque*, &c., however vulgar opinions raised out of the late judgment be to the contrary. The resolution of the House of Commons touching the enlargement of a man committed by command of the king, or the

privy council, or any other, without cause shown of such commitment (*g*) is grounded upon Acts of Parliament, as already shown, upon the reason of the law, as will hereafter be shown, and is strengthened by many precedents of record.

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The precedents of record that concern this point are of two kinds.

1st. Such as show expressly, that persons committed by command of the king, or of the privy council, without other cause shown, have been enlarged upon bail when they prayed it; whence it appears clearly, that by the law, they are bailable, and so by *habeas corpus* to be set at liberty: for though they ought not to have been committed without a cause of commitment shown, yet the judges paid such respect to commitments by command of the king, or of the lords of the council (as also to the commitments some times of inferior persons), that upon *habeas corpus*, they rarely used absolutely to discharge the prisoners, but only to enlarge them upon bail: which sufficiently secures and preserves the liberty of the subject; nor in any of the cases is there any difference made between such commitments by the king and commitments by the lords of the council, who are incorporated with him. In the second class of precedents of record are comprised such as have been alleged to prove that persons so committed ought not to be set at liberty upon bail, and are in the nature of objections out of record.

Precedents of the first kind are twelve in number.

1. King Edward III. had committed by writ under his great seal (as most of the king's commands in those times were) one John de Bildeston, a clergyman, to the Tower, without any cause shown of the commitment. The lieutenant of the Tower is commanded to bring him to the King's Bench, where he is committed to the marshal; but the court asks of the lieutenant if there were any cause for

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keeping Bildeston in prison besides that commitment of the king. He answered no; whereupon the roll says, *quia videtur curie breve predictum sufficientem non esse causam predicti Johan. de Bildeston in prisonâ domini regis hic detinendi idem Johannes admittitur per manucaptionem Williclmi de Wakefield*, and others. Where the judgment of the court is fully declared on the very point (*h*).

2. In the time of Henry VIII., John Parker was committed to the sheriff of London, *pro securitate pacis*, at the suit of one Brinton, *ac pro suspicione felonie* committed by him in Gloucestershire, *ac per mandatum domini regis* he is committed to the marshal of the King's Bench, *et postea isto eodem termino traditur in ballium*. Here were other causes of the commitment, but plainly one was the command of the king, signified to the sheriffs of London, of which they took notice; some indeed have interpreted this, as if the commitment had been for suspicion of felony by the command of the king, in which case it is agreed of all hands, that the prisoner is bailable; but no man can think so who observes the context, and understands the grammar, wherein most plainly the words *ac per mandatum domini regis*, have no reference to any other cause than the command of the king, but constitute a single cause set forth in the return by itself, as the record clearly shows (*i*).

3. John Bincks (*h*) was committed by the lords of the council *pro suspicione felonie ac pro aliis causis illos moventibus, qui committitur marescallo et immediate ex gratiâ curie speciale traditur in ballium*. The lords of the council committed Bincks for suspicion of felony, and other causes them thereunto moving, wherein there might be matter of state, or whatsoever else can be supposed, and plainly the cause of their commitment is not ex-

(*h*) 18 Edw. 3, Rot. 33.

(*h*) 35 Hen. 8, Rot. 33.

(*i*) 22 Hen. 8, Rot. 37.

pressed ; yet the court bailed the prisoner without having regard to those unknown causes that moved the lords of the council. And it was agreed that if a cause be expressed in the return, insomuch that the court can know why the prisoner is committed, he may be bailed, but not if they know not the cause. Now if a man is committed for a cause expressed *et pro aliis causis dominos de concilio moventibus* ; certainly the court can no more know what the cause is than any other.

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4. Richard Overton was returned upon a *habeas corpus*, directed to the sheriffs of London to have been committed and detained *per mandatum prenobilium dominorum honorabilis concilii dominorum regis et reginæ, qui committitur marescallo et immediate traditur in balium* (l). In answer to this precedent, or by way of objection to the force of it, it has been said that Overton at this time stood indicted of high treason. It is true, he was so indicted, but that appears in another roll, having no reference to the return, nor does this return refer to the roll in question ; yet they who thus object against the force of this precedent, say, that because the prisoner was indicted of treason ; therefore though he was committed by command of the lords of the council, without cause shown, yet he wasailable for the treason and upon that was here bailed : than which objection nothing is more contrary either to law or reason. It is most contrary to law, because clearly every return is to be adjudged by the court out of the body of itself, and not by any other collateral or foreign record whatsoever. Therefore the matter of the indictment here cannot in law be cause for bailing the prisoner. So it is adverse to reason, because if the objection be admitted, it must follow, that whosoever be committed by the king or privy council, without cause shown, and be not indicted of treason or some other offence, may not be enlarged, by

(l) 2 & 3 Ph. & M. Rot. 53.

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reason of supposition of matter of state. But that who-soever is so committed, and withal stands so indicted, though in another record, may be enlarged, whatsoever the matter of state be for which he was committed; if so, traitors and felons have the highest privilege in personal liberty,—above all other subjects of the kingdom.

5. Edward Newport was brought into the King's Bench by *habeas corpus* out of the Tower of London, *cum causâ*, viz., *quod commissus fuit per mandatum concilii dominæ reginæ, qui committitur marescallo et immediate traditur in ballium* (m). To this the like answer has been made as to the case last cited; they say, that in another roll of another term of the same year, it appears Newport was in question for suspicion of coining, and it is true he was so; but the return and his commitment mentioned in it, have no reference to any such offence, nor has the bailment of him relation to any thing, but to the absolute commitment by the privy council; so that the answer to the like objection in Overton's case satisfies this also.

6. Thomas Laurence came in by *habeas corpus*, and was returned by the sheriffs of London to be detained in prison *per mandatum concilii dominæ reginæ, qui committitur marescallo et super hoc traditur in ballium* (n). An objection has been invented against this also; it has been said that this man was pardoned, and indeed it appears so in the margin of the roll, where the word *pardonatur* is entered: but clearly his enlargement by bail was upon the body of the return only, unto which that note of pardon in the margin of the roll has no relation; and can any one think that a man pardoned (for what offence soever it be) might not as well be committed for some *arcanum*, or matter of state, as one that is not pardoned, or out of his innocence wants no pardon?

(m) 4 & 5 Ph. & M. Rot. 45.

(n) 9 Eliz. Rot. 35.

7. Robert Constable was brought by *habeas corpus* out of the Tower; and in the return it appears that he was committed *per mandatum privati concilii dominæ reginæ, qui committitur marescallo et postea isto eodem termino traditur in ballium* (o). The like objection has been made to this case as to that of Laurence, but the self-same answer satisfies them both.

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8. John Browning came by *habeas corpus* out of the Tower, whither he had been committed, and was returned to have been committed *per privatum concilium dominæ reginæ, qui committitur marescallo et postea isto eodem termino traditur in ballium* (p). To this it has been said, that it was done at the Chief Justice Wray's chamber, and not in court: and thus the authority of the precedent has been lessened or slighted. If it had been done at his chamber, it would have proved at least this much, that Sir Christopher Wray, then Chief Justice of the King's Bench, being a grave, learned, and upright judge (q), knowing the law to be so, did bail this Browning, and enlarge him, and even so far the precedent were of value enough; but it is plain that though the *habeas corpus* were returnable, as indeed it appears in the record itself, at his chamber in Serjeant's-Inn, yet he only committed the prisoner to the King's Bench presently, and referred the consideration of enlarging him to the court, who afterwards did it: for the record says, *et postea isto eodem termino traditur in ballium*, which cannot be of an enlargement at the Chief Justice's chamber.

9. Edward Harecourt was imprisoned *per dominos de privato concilio dominæ reginæ pro certis causis eos moventibus et ei ignotis*: and upon *habeas corpus* was returned to be therefore only detained, *qui committitur marescallo et postea isto eodem termino traditur in ballium* (r). To this no colour of answer has yet been offered.

(o) 9 Eliz. Rot. 68.

judge in 3 Rep. 25, b.

(p) 20 Eliz. Rot. 72.

(r) 40 Eliz. Rot. 62.

(q) See also a eulogy upon this

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10. Robert Catesbie was committed to the Fleet *per warrantum diversorum prænobilium virorum de privato concilio dominie regine*; he was brought before Justice Fenner, of the King's Bench, by *habeas corpus* at Winchester-house, Southwark; *Et commissus fuit marescallo per præfatum Edwardum Fenner, et statim traditur in ballium (s)*.

11. Richard Beckwith was returned upon his *habeas corpus* to have been committed by divers lords of the privy council; *qui committitur marescallo et postea isto eodem termino traditur in ballium (t)*. To this it has been said that Beckwith was bailed upon a letter, written by the lords of the council for that purpose to the judges; but it appears not that there was any such letter written to them, and, though there had been, it would have proved nothing against the authority of the record; for it was never heard of, that judges were to be directed in point of law by letters from the lords of the council, although it cannot be doubted, but that by such letters sometimes they have been moved to bail men, that would not or did not ask their enlargement without such letters.

12. Thomas Monson was committed to the Tower *per warrantum à diversis dominis de privato concilio domini regis locum tenenti directum*; and he was returned by the lieutenant to be therefore detained in prison, *qui committitur marescallo et super hoc traditur in ballium (u)*. To this it has been answered, that everybody knows by common fame, that this gentleman was committed for suspicion of the death of Sir Thomas Overbury (x), and that he was therefore bailable: a most strange interpretation, as if the body of the return and the warrant of the privy council were to be understood and adjudged out of fame only.

(s) 43 Eliz.

(t) 12 Jac. 1, Rot. 153.

(u) 14 Jac. 1 Rot. 147.

(x) See *The arraignment of Sir Thomas Monson for the murder of Overbury*, 2 St. Tr. 949.

Precedents of the second class are of two kinds. 1st. Where some assent of the king or privy council appears upon the enlargement of a prisoner committed by command of the one or of the other; as if, because such assent appears, the enlargement could not have been without it. 2ndly. Where the judges, under the circumstances supposed, are said to have refused bail.

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Cases of the first kind, belonging to this second class of precedents, began in the time of Henry VII. 1. Thomas Brugge and others were then imprisoned in the King's Bench *ad mandatum domini regis*, they never sought remedy by *habeas corpus*, or otherwise, for aught that appears; but the roll says, that *dominus rex relaxavit mandatum*, and so they were bailed (*y*). But can any man think, that this is an argument either in law or reason, that therefore they could not have been bailed without such assent? It is common for one being in prison for surety of the peace or the like at suit of another, to be bailed upon the release of the complainant; can it follow, that therefore he could not have been bailed without such release? Nothing is more plain than the contrary. It were the same thing to say, that if a plaintiff be non-suit, therefore unless he had been non-suit, he could not have been barred in the suit (*z*).

2. Thomas Yew was committed *ad securitatem pacis*—for the security of the peace—at suit of one Freeman, and besides *ad mandatum domini regis*. And first, Freeman *relaxavit securitatem pacis*, and then Sir James Hobbard, Att.-Gen., *relaxavit mandatum domini regis*; and thereupon he was bailed (*a*). The release of the king's attorney no more proves that he could not have been enlarged without such release or assent, than that he

(*y*) 7 Hen. 7, Rot. 6.

mond's Case, in the same year, Rot. 18.

(*z*) A like answer may be given to *The Case of Bartholomew and others*, 7 Hen. 7, Rot. 13; and to *Beo-*

(*a*) 22 Hen. 7, Rot 8.

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could not have been bailed without release of surety of the peace by Freeman (b).

3. Laurence Broome was committed *per mandatum dominorum concilii domine reginæ*, and, being returned so upon the *habeas corpus*, is first committed to the Marshalsea, and then bailed by the court (c). It is true, that in the scrolls of that year, where the bails are entered, but not in the record of the *habeas corpus*, there is a note, that this Broome was bailed *per mandatum privati concilii*; but this is not an argument, that therefore in law he might not have been otherwise bailed (d).

In these cases (1), it appears not that the party ever desired to be enlarged by the court, or was denied it. (2), Letters either from the king or council cannot alter the law; so that hitherto nothing has been urged on behalf of the Crown having any force or colour of reason in it.

We come now to precedents of the other kind, cited against the liberty of the subject; *i.e.*, such as have been used to show that persons committed by command of the king or council, may not be enlarged by the court. They are in number eight, but not one of them proves any such thing, as will plainly appear. 1. The first four of them are exactly in the same words, saving that the names of the persons and the prisons differ.

Ex. gr., Richard Everard and others were committed to the Marshalsea of the household, *per mandatum domini regis*, and so returned upon a *habeas corpus* into the King's Bench; whereupon the entry is only *qui committitur marescallo, &c.* (c).

(b) *Acc. The Case of Humphry Broche*, 7 Hen. 7, Rot. 14.

(c) 39 Eliz. Rot. 128.

(d) A like answer may be given in the following cases:—*Wenden's Case*, 43 Eliz. Rot. 37; case in 43 Eliz. Rot. 39, where divers persons of

quality had been imprisoned by command of the privy council, and the queen directed that they should be bailed; *Sir John Brockel's Case*, 1 Jac. 1, Rot. 30; *Reyner's Case*, 2 Jac. 1, Rot. 119.

(c) 7 Hen. 7, Rot. 18. The three

These four have been used principally, as express precedents, to prove that a prisoner so committed cannot be enlarged; and perhaps at first sight, to men that know not and observe not the course and entries of the court of King's Bench, they may be thought to prove as much; but, in truth, they rather prove the contrary, at least there is no colour in them of any such matter as they have been used for.

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According to the course of practice in the King's Bench when a prisoner is brought in by *habeas corpus*, he is (if he be not remanded) first committed to the marshal of the court, and then bailed as his case requires. Now these men, being committed by the express command of the king, are first taken from the prisons whither they were committed; although, if a general suspicion of matter of state were of force in such a case, it might be as needful to have the prisoner remain in the prison, whither the king committed him, as to have him at all committed. When the court have taken the prisoners from the prisons where before they were, they commit them to the marshal of their own court, which is but the first step to bailing them. Now it appears not in the foregoing cases that the prisoners were bailed, for then *traditur in ballium* had followed. Nor does it appear that they were denied it: perhaps they never asked for it, perhaps they could not find such as were sufficient to bail them. And, in truth, whensoever any man is removed from any prison in England (though it be for debt or trespass only), into the court of King's Bench, the entry is the same as in these four cases.

2. Edward Page's case (*f*) might have been well reckoned with the former four, had not the mis-entry of the clerk made it vary from them. Edward Page was

other cases alluded to *supra* are— *wick's Case*, 19 Hen. 7, Rot. 19.
Cherry's Case, 8 Hen. 7; *Burton's* (*f*) 7 Hen. 8.
Case, 9 Hen. 7, Rot. 14; and *Urs-*

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committed to the Marshalsea of the household, *per mandatum domini regis*, and returned to be therefore detained, and the entry is *qui committitur marescallo hospitii domini regis*. Here the word "Marr." for Marescallo is written in the margin of the roll, which shows that the prisoner was committed to the marshal of the King's Bench, and not remanded to the Marshalsea of the household. And doubtless the words *hospitii prædicti* were added by the error of the clerk, for want of distinguishing between the marshal of the King's Bench, and the marshal of the household.

3. Thomas Cæsar (*g*) was committed to the Marshalsea of the household, *per mandatum domini regis*, and returned to be therefore detained, and a *remittitur* is in the roll, not a *remittitur quousque*, but that kind of *remittitur* which is used while the court advises. And this is far from proving anything against the resolution of the House of Commons, it rather shows the opinion of the judges to have been that the return was insufficient, and that, if it were not amended, the prisoner should be discharged.

4. James Desmaistres, Edward Emerson, and others, who were brewers, were committed to the Marshalsea of the household, *per mandatum domini regis*, and so returned upon *habeas corpus*: and although the roll shows that they were remanded, the remanding was only upon advisement. Indeed the judges of that time were so careful, lest upon the entry of remand, any mistake might be made so as to mislead posterity, that they had *immediate* added to the *remittitur*, that so all men might see that the remand was for the present only, and not upon debate of the question. And besides, there is no *quousque* added to it (*h*).

5. Sir Samuel Saltonstall was committed to the Fleet, *per mandatum domini regis*; and also by the Court of

Chancery, for disobeying an order of that court; and is returned upon his *habeas corpus* to be therefore detained (i). And although a *remittitur* is entered in the roll, it is only a *remittitur prisonæ prædictæ* without *quousque secundum legem deliberatus fuerit*. It appears moreover on the record, that the court gave the warden of the Fleet three several days at several times to amend his return, and in the interim *remittitur prisonæ prædictæ*. If the court had thought the return good, why need it have been amended?

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Of the foregoing precedents, there is not one which proves that persons committed by command of the king, or the lords of the council, without cause shown, might not be enlarged; but most of them prove rather the contrary.

Of the second kind of precedents (mentioned at page 195), there is but one, viz., the resolution of all the judges (k), in the 34th year of Queen Elizabeth, when divers persons having been committed by absolute command—*sur pleasure*—without good cause, and having been delivered by the justices, the judges were desired to declare in what cases persons committed by such command were to be enlarged. To which they answered thus:—

We think that if any person be committed by Her Majesty's commandment, from her person or by order from the council board, or if any one or two of her council commit one for high treason, such person so committed may not be delivered by any of her courts without due trial by the law and judgment of acquittal had. Nevertheless the judges may award the queen's writ to bring the body of such person before them; and if, upon return thereof, the cause of commitment be certified as it ought to be, then the judges ought not to deliver the prisoner, but to remand him to the place from

(i) 12 Jac. 1; 13 Jac 1, Rot. 71.

(k) 1 Anderson, R. 297.

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whence he came, which cannot conveniently be done unless notice of the cause, generally or specially, be given to the keeper or gaoler having the custody of such prisoner.

If this resolution resolves anything, it resolves the contrary to that which has been pretended, and affirms the ancient and fundamental rule, that liberty of the person may be regained by *habeas corpus* when any man has been wrongfully imprisoned.

Argument of
Sir E. Coke.

To Sir E. Coke was assigned the task of adducing reasons in affirmance of statutes and precedents for the liberty of the subject, against imprisonment without cause expressed. He argued thus:—

I. No man can be imprisoned upon will and pleasure of any, but a bondman or villein.

II. If a freeman of England might be imprisoned at the will and pleasure of the king, or by his command, he were in worse case even than a villein; for the lord cannot command another to imprison his villein without cause, as for disobedience, or refusing to serve him. *Ex. gr.*, A prior had commanded one to imprison his villein whom the judges were ready to bail, till the prior gave his reason, viz., that the villein refused to be bailiff of his manor, and that satisfied the judges (*l*).

III. A freeman imprisoned without cause is civilly dead, for death and imprisonment produce the like immediate effects. If a man be threatened with death he may avoid a feoffment of land, a gift of goods, &c. So it is if he be threatened with imprisonment; the one is an actual, the other is a civil death.

IV. *Minima pœna corporalis est major quâlibet pecuniariâ* (*n*). But the king himself cannot impose a fine

(*l*) Year Bk. 7 Edw. 3, p. 50, pl. 24.

(*n*) Bracton, fo. 105, whose words are—*Idem est pœna pecuniaria sicut*

corporalis et quâlibet pœna corporalis quamvis minima major est quâlibet pœnâ pecuniariâ.

upon any man, it must be done by his judges—*per justiciarios in curiâ, non per regem in camerâ* (o).

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V. Another reason is deducible from the number and diversity of remedies allowed by law for false imprisonment, viz., by writ *de homine replegiando* (p), *de odio et atia* (q), or of *habeas corpus*—an appeal of imprisonment (r) and by writ *de manucaptione* (s). Now the law would never have given so many remedies if the freemen of England might have been imprisoned at the will and pleasure of the king.

VI. The pretended power of imprisoning would extend

(o) See Year Bk. 3 Ric. 3, p. 11, pl. 22 *ad fin.*

(p) This writ was principally used “to replevy a man out of prison, or out of the custody of any private person, in the same manner that chattels taken in distress may be replevied, upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him.” 3 Steph. Com. 627; *ante*, p. 75, n. (t).

(q) This writ was anciently used. It was directed to the sheriff, commanding him to inquire whether a prisoner charged with murder was committed upon just cause of suspicion, or merely *propter odium et atiam*, for hatred and ill-will; and if upon the inquisition due cause of suspicion did not appear, then there issued another writ for the sheriff to admit him to bail. This writ, according to Bracton, lib. iii. cap. 8, s. 6, ought not to be denied to any man, it being expressly ordered to be made out *gratis*, without any denial, by Magna Charta, c. 26, and Stat. Westm. 2, 13 Edw. 1, st. 1, c. 29. This writ was abolished by 28 Edw. 3, c. 9, but, according to Sir E. Coke's

opinion, was revived by 42 Edw. 3, c. 1, which repealed all statutes then in force contrary to the Great Charter: 2 Inst. 43, 55, 315.

(r) See the form of this appeal, *De pace et imprisonmento*, Bracton, lib. iii. cap. 25. It has for centuries been obsolete, the action for trespass having been found to be an efficient substitute for it. Hawk. P. C. bk. ii. chap. 23, s. 15.

(s) “The writ of mainprize, *manucaptio*, is a writ directed to the sheriff (either generally, when any man is imprisoned for a bailable offence and bail hath been refused; or specially, when the offence or cause of commitment is not properly bailable below), commanding him to take sureties for the prisoner's appearance, usually called *mainpernors*, and to set him at large. Mainpernors differ from bail, in that a man's bail may imprison or surrender him up before the stipulated day of appearance; mainpernors can do neither, but are barely sureties for his appearance at the day,” and are bound to produce him to answer all charges whatsoever. 3 Steph. Com. 627. See further as to this writ, 2 Swanst. 83 *et seq.*

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not only to the commons of this realm and their posterity, but to the nobles of the land, to the bishops and clergy and their successors. *Commune periculum commune requirit auxilium.* Nay, it would reach to all persons of what condition, sex, or age soever; *ex. gr.*, all judges and officers whose attendance in court or elsewhere may be necessary.

VII. The pretended power not being limited as to time might extend to imprison during life; but to cast an old man into prison, no time being allotted for his coming forth from it, were hard. And it would be unreasonable that one having a remedy for his horse or cattle, if illegally detained, should have none for his body thus indefinitely imprisoned.

VIII. The last argument is threefold, being drawn *ab honesto—ab utili—a tuto*. 1st. It would be no honour to a king to be a king of bondmen or slaves. 2ndly. It would be prejudicial to the king and kingdom, for the execution of Magna Carta and of other statutes, whereby the king was restrained from imprisoning at pleasure, was adjudged in parliament to be for the common good of the king and people, and this pretended power, being calculated to prejudice the king, can be no part of his prerogative. 3rdly. The exercise of the pretended power might be dangerous to the king for two reasons. For (1), If a man be committed without expressing the cause, albeit for treason or felony, though he escape, yet this escape is neither felony nor treason; but if the cause be expressed for suspicion of treason or felony, then the escape, though innocent, is treason or felony (*t*): and (2), Who will employ himself in any profession or trade, if he be but a tenant at will of his liberty? For no

(*t*) "It seems to be generally agreed that a voluntary escape amounts to the same kind of crime as the offence of which the party was guilty, and for which he was in

custody," whether the party escaping were attainted or only accused of crime. 1 Russell on Crimes, 5th ed. 574.

tenant at will will support or improve that in which he has no certain estate ; *ergo*, to make men tenants at will of their liberties would destroy industry.

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—
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Argument.

If a remedy had been given in this case, the Commons would not have meddled therewith ; but a remedy not being obtainable in the King's Bench, they desire some provision for the future, which may secure to the Lords, to themselves and their posterity, the enjoyment of their ancient undoubted and fundamental liberties.

These conferences between the two houses of Parliament resulted in the Petition of Right, which, so far as it concerns the liberty of the subject, recites and prays as follows :—

“Whereas by the statute called ‘The Great Charter of the Liberties of England,’ it is declared and enacted, that no freeman may be taken or imprisoned or be disseised of his freehold or liberties, or his free customs, or be outlawed or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land (*u*).

Petition of
Right.

“And in the 28th year of the reign of King Edward III., it was declared and enacted (*x*) by authority of Parliament, that no man, of what estate or condition he be, should be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought to answer by due process of law.

“Nevertheless, against the tenor of the said statutes, and other the good laws and statutes of your realm (*y*), to that end provided, divers of your subjects have of late been imprisoned, without any cause shown ; and when for their deliverance they were brought before your justices, by your Majesty's writs of *habeas corpus*, there to undergo and receive as the court should order, and their keepers

(*u*) 9 Hen. 3, c. 29.

(*x*) 28 Edw. 3, c. 3.

(*y*) 37 Edw. 3, c. 18 ; 38 Edw. 3,

c. 9 ; 42 Edw. 3, c. 3 ; 17 Ric. 2,

c. 6.

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CASE.
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commanded to certify the causes of their detainer: no cause was certified, but that they were detained by your Majesty's special command, signified by the lords of your privy council, and yet were returned back to several prisons, without being charged with anything to which they might make answer according to the law.

"They do, therefore, humbly pray your most excellent Majesty that no freeman in any such manner as is before mentioned, be imprisoned or detained."

To this petition, after some attempts at evasion by the king, answer was at length given in the usual form—*Soit droit fait come est désiré*.

NOTE TO
DARNEL'S
CASE.

Commenting upon the 29th chapter of Magna Carta, Sir E. Coke observes (z):—

Writ of
habeas
corpus the
only remedy
against the
Crown for
false im-
prisonment.

It may be demanded if a man be taken or committed to prison against the law of the land, what remedy hath the party grieved? To this it is answered, 1st. That every Act of Parliament made against any injury, mischief, or grievance, doth either expressly or impliedly give a remedy to the party wronged or grieved, and therefore he may have an action grounded upon this Great Charter. 2ndly. He may prosecute by indictment under the statute at the king's suit. 3rdly. He may have a *habeas corpus*, upon which writ the gaoler must return by whom the prisoner was committed, with the cause of his imprisonment, and if it appear that his imprisonment be just and lawful, he shall be remanded to gaol, but if it appear to the court that he was imprisoned against the law of the land, they ought by force of this statute (Magna Carta), to deliver him; if it be doubtful he may

be bailed. 4thly. The party aggrieved may have an action for false imprisonment. In the above passage Lord Coke indicates three remedies for false imprisonment, wholly dissimilar in kind, by action, by indictment, and by *habeas corpus*, of which the two former are inapplicable as against the Crown, for the sovereign cannot be sued in a court where he is in theory of law dispensing justice, nor can the sovereign be criminally prosecuted at his own suit; therefore the remedy by *habeas corpus* is alone of the remedies set forth appropriate for redressing the supposed grievance as against the Crown.

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CASE.

The writ of *habeas corpus ad subjiciendum*, applicable at common law for ensuring the liberty of the subject, is a prerogative writ (a), a writ of right (b), though not of course (c), and grantable *ex debito justitiæ* (d). It is in the nature of a writ of error to examine the legality of a commitment, and therefore commands the day, the caption, and cause of detention to be returned (d). The question consequently raised in the principal case, viz., whether the command of the Crown would, *per se*, suffice to justify the commitment and detention of a subject, was of the highest constitutional importance; and although the question there, as well in court as in parliament most elaborately argued, might seem in terms to have been settled by the Petition of Right, and formal assent thereto of the Crown, we yet find that in the very next year (A.D. 1629), proceedings of the most arbitrary kind were taken in arresting, at the pleasure of the Crown, Selden

Nature of
the writ of
*habeas
corpus*.

(a) *Per* Lord Eldon, *Crowley's Case*, 2 Swanst. 48; Corner, Cr. Off. Pr. 110; 2 Burr. 855.

(b) *Per* Marlay, C.J., 18 St. Tr. 19.

(c) *Hobhouse's Case*, 3 B. & Ald. 420; *Ex parte Knight*, 2 M. & W. 106; *per* Lord Eldon, 2 Swanst. 61.

(d) Bac. Abr. 7th Ed. vol. iv. p. 114.

NOTE TO
DARNEL'S
CASE.Proceedings
against
Selden and
others.Return to
habeas
corpus.

and others (c), members of the House of Commons, and that an attempt was made to evade the words of the Petition of Right by setting forth colorably a cause of commitment in the warrant, and in the return to the *habeas corpus*.

In the case of each of the persons thus committed, upon a *habeas corpus* to the marshal of the King's Bench to bring into court the body of the prisoner with the cause of his imprisonment; it was returned;—that the prisoner was committed by virtue of a warrant under the hands of twelve lords of the privy council, directed to the marshal of the King's Bench, the tenor whereof was in these words:—"You are to take knowledge, that it is his Majesty's pleasure and commandment, that you take into your custody the body of —, and keep him close prisoner till you shall receive other order, either from his Majesty, or this board."

"He is also detained in prison by virtue of a warrant under his Majesty's hand; the tenor of which warrant follows:—Whereas you have in your custody the body of —, by warrant of our lords of our privy council, by our special command, you are to take notice, that this commitment was for notable contempts by him committed against ourself and our government, and for stirring up sedition against us; for which you are to detain him in your custody, and to keep him close prisoner, until our pleasure be further known concerning his deliverance."

Arguments
for the
prisoners.

Against the sufficiency of the above return it was thus argued:—Offences are of two kinds, capital or trespasses, and are punishable in two ways, capitally, or by fine and imprisonment. For offences of the first nature, as trea-

(c) *Proceedings against Stroud, Long, Selden, and others*, 3 St. Tr. 235.

sons, and the like, imprisonment is imposed upon the offender only for custody; but for misdemeanors imprisonment is imposed upon him as a punishment. And no freeman imprisoned only for misdemeanor may be detained in prison before conviction without bail, if it be offered, unless in some particular cases, in which the contrary is ordained by statute.

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The warrant of the privy council, which signifies the pleasure of the king to commit the prisoner, although perhaps a good ground of commitment, is no ground for detaining the prisoner without bail.

In the king's warrant, as certified by the return, there is not any sufficient cause set forth for detaining the prisoner; for the law being, that for a misdemeanor no freeman may be imprisoned before conviction, without bail or mainprize, the sole question is, does this return contain within it any capital offence, or does it specify only a trespass or misdemeanor, in which latter case the party is bailable? As to the first part of it "for notable contempts by him committed against ourself and our government," all contempts are against the king, mediately or immediately, and against his government; and the word "notable," which means notorious and manifest, is but an emphatical expression of the nature of the thing, and alters not its nature. All riots, routs, batteries, and trespasses, are "against us," and "against our crown and dignity;" contempt against our court of justice is a contempt "against us." But in the return, the nature of the offence ought to be clearly expressed, that the court may judge of it. And for contempts before conviction, the party cannot be imprisoned without bail or mainprize.

Then as to the second part of the warrant—"For

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stirring up sedition against us"—it may be observed that sedition is not a determinate offence within our law, which defines other offences; to wit, treason, murder, felony, &c. Nor would an indictment for sedition *simpliciter* be good (*f*).

Then the words "against us," signify against our authority—our peace, crown, and dignity, which are the usual words in every indictment of felony. Every breach of the peace is against the king. The usual return upon an ordinary writ out of this court is, that the party be before us; and contempt to this court is contempt against us; and is in the nature of sedition against the king. The king styles himself "us" in writs; and every disobedience to any writ may be styled "sedition against us." Routs, riots, illegal assemblies, may well be called "sedition against us:" and for such offences, a man is bailable.

The very grievance complained of in the Petition of Right is, that the cause of commitment had not, where the commitment was by command of the king or his council, been certified in the return, so that an indictment might be drawn up; for the prisoner is to be tried not upon the *habeas corpus*, but upon an indictment charging the matter contained in the return. Though it is clear that if the cause be certified in the return to the *habeas corpus*, the court may judge of the legality of the cause.

If a man stand committed for treason or murder, the judges do not often enlarge him on bail (*g*), unless it

(*f*) 1 Hale, P. C. 77; 1 East, P. C. chap. 2, s. 1.

(*g*) By way of introduction to this branch of the argument the reader

may be reminded that the Court of King's Bench had—and the Queen's Bench Division of the High Court of Justice, or in vacation a judge

appear to them that there has been either want of prosecution, or of evidence to proceed; or that the evidence is slight (*h*). So that in bailing for offences of the highest nature, a kind of discretion is exercised, according to which they let to bail, detain, or remand the prisoner.

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Also in less heinous felonies, capitally punishable, the imprisonment of the offenders without bail is only used *ad salvam custodiam*, and cannot be used *ad pœnam*. But if a prisoner before conviction stand committed for trespasses punishable by fine and imprisonment, unless there be some Act of Parliament to the contrary, upon offer of good bail he should be enlarged, that so the court may, by his sureties and bail, to whose care he is anew committed, be assured to have him ready at the day given, to answer all charges against him; and that he himself, having sureties who undertake for his appearance, may not be compelled, before conviction, to endure that, *ad custodiam* only, which is the highest part of what he is to suffer, after conviction, *ad pœnam*. Hence, in case of imprisonment for an offence of the first kind, sufficient bail offered may, according to the practice, be refused by the court. But in case of imprisonment for an offence of the second kind, sufficient bail, offered

thereof, now has—a discretionary power of admitting to bail any prisoner charged with treason, felony, or misdemeanor, or charged on suspicion of such offence, when brought before the said court or judge by virtue of a writ of *habeas corpus*. Arch. Cr. Pl. 18th ed. 91. The Queen's Bench Division, or in vacation a judge thereof, has also a discretionary power of directing a prisoner to be admitted to bail before a magistrate, where it

would be inconvenient to bring the prisoner and his bail before the court or judge in town, or, on just cause being shown, to order that a party not in custody shall be admitted to bail on surrendering to a warrant.

(*h*) The considerations which would now guide the court as to accepting or refusing bail are set forth *per* Coleridge, J., in *Barronet's Case*, 1 E. & B. 6; and see *Barthelmy's Case*, 1 E. & B. 8; S. C. 22 L. J., M. C. 25.

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before conviction, ought of common right to be accepted; save where a special Act of Parliament alters the law in some particular case; there is, however, no colour or pretence of any such Act concerning the case *sub judice*.

The question consequently is reduced to this:—Does the expression “for notable contempts against ourself and our government and for stirring up sedition against us,” denote an offence of the first mentioned kind? This phrase has been shown not to do so, therefore the prisoners ought to be bailed. Though if the return had been, that the prisoner was committed for treason, he had not been bailable but at the discretion of the court, and such return would have been good.

Subsequent
proceedings
in Selden's
Case.

Before any judgment as to the sufficiency of the above returns to the several writs of *habeas corpus* had been given by the court, the prisoners were, by warrant of the king, taken out of the custody of the marshal of the King's Bench and committed to the Tower. Having been restrained from liberty throughout the long vacation, the prisoners were, on an intimation from the king that they should be bailed in the ensuing Michaelmas Term, brought before the Court of King's Bench, by whom they were ordered to find not only bail, but sureties for their good behaviour, and, on refusing to comply with this requisition, they were remanded to custody. Afterwards the proceedings were dropped as regarded some of the prisoners; and the others, against whom the charge exhibited on information by the Attorney-General involved a question of parliamentary privilege which was resolved adversely to them, were eventually fined (*i*). The

(*i*) 2 Hallam, Const. Hist. Eng., (Hist. Eng., vol. vi. p. 276),
3; 2 Rapin, Hist. Eng., 280. “and after several delays, the pri-
soners were released, and the law

judgment thus given on the question of privilege to which further allusion here would be irrelevant (*k*), was afterwards solemnly reversed (*l*).

NOTE TO
DARNEL'S
CASE.

In tracing out the conflict respecting the right of personal liberty between the subject and the Crown, attention must next be directed to the important Act (*m*) for abolishing the Star Chamber—the preamble whereof recites, amongst other statutes, the stat. 28 Edw. 3, c. 3 —“that no man, of what state or condition soever he be, shall be put out of his lands or tenements, nor taken, nor imprisoned, nor disinherited, without being brought in to answer by due process of law;”—and the stat. 42 Edw. 3, c. 3,—“that no man be put to answer without presentment before justices, or matter of record, or by due process and writ original, according to the old law of the land; and if anything be done to the contrary it shall be void in law and holden for error;”—by which it is enacted (*n*), that “if any person shall hereafter be committed, restrained of his liberty, or suffer imprisonment” . . . “by the command or warrant of the king’s majesty, his heirs or successors in their own person or by the command or warrant of the council board, or of any of the lords or others of his majesty’s privy council (*o*), in every such case every person so committed, retrained of his liberty, or suffering imprisonment, upon demand or motion made by his counsel, or other employed by him for that purpose unto the judges of the Court of King’s Bench or Common Pleas (*p*) in open

16 Car. 1,
c. 10.

was generally supposed to have been wrested in order to prolong their imprisonment.”

(*k*) *Vide post*, Part III.

(*l*) 2 Hallam, Const. Hist. Eng., 6.

(*m*) 16 Car. 1, c. 10.

(*n*) 16 Car. 1, c. 10, s. 8.

(*o*) Ss. 8, 9, *ad finem*.

(*p*) The statute *supra* gave no jurisdiction to the judges of the Common Pleas to issue a writ of *habeas corpus* except in the cases therein

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CASE.16 Ctr. 1,
c. 10.

court (q), shall without delay upon any pretence whatsoever, for the ordinary fees usually paid for the same, have forthwith granted unto him a writ of *habeas corpus*, to be directed generally unto all and every sheriffs, gaoler, minister, officer, or other person in whose custody the party committed or restrained shall be." And the sheriff, gaoler, or other person "in whose custody the party so committed or restrained shall be, shall at the return of the said writ, and according to the command thereof, upon due and convenient notice thereof given unto him, at the charge of the party who requireth or procureth such writ, and upon security of his own bond given to pay the charge of carrying back the prisoner if he shall be remanded by the court to which he shall be brought as in like cases hath been used, such charges of bringing up and carrying back the prisoner to be always ordered by the court if any difference shall arise thereabouts, bring or cause to be brought the body of the said party so committed or restrained unto and before the judges or justices of the said court from whence the same writ shall issue in open court; and shall then likewise certify the true cause of such his detainer or imprisonment: and thereupon the court, within three court days after such return made and delivered in open court, shall proceed to examine and determine whether the cause of such commitment appearing upon the said return be just and legal or not;

mentioned, but by a construction in favour of liberty, they granted the writ in other cases. *Per* Lord Eldon, C., *Crowley's Case*, 2 Swanst. 41. Judgment, *Bushell's Case*, Vaugh. 154 *et seq.*

(q) The application under the statute *supra* must have been made

to the court, not to the judges individually. *Per* Lord Eldon, C., 2 Swanst. 52. See now 36 & 37 Vict. c. 66, s. 31, and Order in Council, 16th Dec. 1880, as to the Jurisdiction of the Queen's Bench Division of the High Court of Justice.

and shall thereupon do what to justice shall appertain either by delivering, bailing, or remanding the prisoner.”

And if anything be otherwise wilfully done or omitted to be done by any judge, justice, or officer contrary to the direction and true meaning of the Act, the person so offending shall forfeit to the party grieved his treble damages, to be recovered by action of debt (*r*), to be brought within two years from the commission of the offence (*s*).

NOTE TO
DARNEL'S
CASE.

16 Car. 1,
c. 10.

In direct conflict with the resolutions of the House of Commons on which the Petition of Right was founded, and with the policy which dictated the provisions just above set out, was the delay about granting a *habeas corpus* in *Jenkes's Case* (*t*). In the month of June, A.D. 1676, Jenkes, a trader in the city of London, delivered at the Guildhall a speech, in which, after complaining of the general decline of trade and adverting to the dangers apprehended to Protestantism, he urged that a Common Council should speedily be held to petition that a new parliament might be summoned with a view to quieting men's minds, and remedying the mischiefs complained of. Shortly after the delivery of this speech, which met with general approval, Jenkes was summoned before the Council Board, at which the king, with the chancellor (Lord Nottingham), and other lords, was sitting. And thereupon, an affidavit made by the sheriffs of London and others having been read, which alleged as above stated, the council proceeded to examine Jenkes, who, not answering so submissively as was desired, was forthwith committed to prison by a warrant of the council

Proceedings
in *Jenkes's*
Case, 1676.

(*r*) S. 7.

(*s*) S. 10.

(*t*) *Proceedings against Mr. Francis Jenkes*, 6 St. Tr. 1189.

NOTE TO
DARNEL'S
CASE.

Jenkes's Case.
Warrant of
commitment.

directed to the keeper of the Gatehouse, Westminster, in this form:—

“Whereas it appears to his Majesty in Council, by the examination of —, taken upon oath, That Francis Jenkes, of —, did, on —, at a Common Hall, then assembled at the Guildhall of the City, for choosing officers for the ensuing year, in a most seditious and mutinous manner, openly move and stir the persons then present, That before they did go on to the choice of new officers (which was the only occasion of that assembly) they should go to the Lord Mayor, and desire him to call a Common Council, that might make an address to his Majesty in the name of the City, to call a new parliament. And whereas the said Francis Jenkes, being now called in, and heard before his Majesty in Council, was so far from denying or extenuating his offence, that he did in a presumptuous and arrogant manner endeavour to justify the same: These are therefore to command you to take into your custody the body of the said Francis Jenkes, herewith sent you, and him to keep safely, until he shall be delivered by due course of law; for which this shall be your warrant.”

Various attempts to obtain the enlargement of Mr. Jenkes were made, as well by applying to the Secretary of State, and through him to the Council, as by moving for a *habeas corpus* before the Lord Chief Justice, the Lord Chancellor, and the Court of Quarter Sessions for Westminster, within the liberty whereof the prisoner was confined. The application to the Chancellor, made in vacation, was supported by the authority of Lord Coke, who, speaking of the writ of *habeas corpus* in the King's Bench, says (*u*), The like writ is to be granted out of the

(*u*) 2nd Inst. 53.

Chancery, either in term (as in the King's Bench) or in the vacation; for the Court of Chancery, is *Officina Justitiæ*, and is ever open (*x*), and never adjourned: so as the subject being wrongfully imprisoned may have justice for the liberty of his person, as well in the vacation time as in term. And, speaking of the Court of Chancery, he says, "This court is the rather always open, for that if a man be wrongfully imprisoned in the vacation, the Lord Chancellor may grant a *habeas corpus* and do him justice according to law." Lord Nottingham, however, held (erroneously as since decided by Lord Eldon in *Crowley's Case* (*y*)), that the writ could not issue out of Chancery in vacation. A writ of mainprize (*z*) was then applied for; and it seems that afterwards the Chancellor considering that all imprisonment before trial was *ad custodiam* and not *ad pœnam*, that Jenkes, though he had used extraordinary means to deliver himself, had been long enough in gaol, and that if he were released by the gaol delivery it might be of ill consequence, advised the Chief Justice Rainsford to counsel the king that it would be better to have Jenkes enlarged on bail, security to answer an information being given; and so he was eventually bailed (*a*).

Some three years after the proceedings in *Jenkes's Case*, although not, as Mr. Hallam conclusively shows (*b*), in consequence thereof, was passed the *Habeas Corpus Act* (*c*)—intituled "An Act for the better securing the liberty of the subject, and for preventing of imprison-

NOTE TO
DARNEL'S
CASE.
Jenkes's Case.

(*x*) 4 Inst. 81.

(*y*) 2 Swanst. 1; *Re Belson*, 7 Moo. P. C. C. 114.

(*z*) *Ante*, p. 201, n. (*s*).

(*a*) See the account of the proceed-

ings in *Jenkes's Case*, per Lord Eldon, C., 2 Swanst. 46, 47.

(*b*) 3 Const. Hist. Eng., p. 11.

(*c*) 31 Car. 2, c. 2.

*Habeas
Corpus Act*,
31 Car. 2,
c. 2.

NOTE TO
DARNELL'S
CASE.

31 Car. 2.
c. 2.

ment beyond the seas." This statute was framed for preventing the detention in illegal custody of persons "committed for criminal or supposed criminal matters." It enacts,—That when any writ of *habeas corpus* is directed to and served upon any sheriff or gaoler for any person in his custody, such officer shall, within three, ten, or twenty days from the service thereof (according to distance), upon payment or tender of the charges of bringing up the prisoner, &c., *unless the commitment were for treason or felony*, plainly and specially expressed in the warrant of commitment, or where the person in custody shall appear to have been committed by any judge or justice of the peace, and charged as accessory before the fact to any petty treason or felony, or upon suspicion of such petty treason or felony plainly expressed in the warrant (*d*), bring or cause to be brought the body of the party so committed before the Lord Chancellor or court whence the writ issued, or person before whom it is made returnable, and shall then likewise certify the true cause of the detainer or imprisonment (*e*).

That on complaint and request in writing by or on behalf of any person committed and charged with any crime (unless as aforesaid, or unless the person in custody is detained upon a legal process, order, or warrant out of some court having jurisdiction of criminal matters, or by some warrant of a judge or justice of the peace for an offence not bailable), the Lord Chancellor or any judge in vacation, upon viewing a copy of the warrant or an affidavit that a copy is denied, shall (unless the party on whose behalf the application is made has neglected for two terms to apply for his

(*d*) S. 21.

(*e*) S. 2.

enlargement (*f*)) award a *habeas corpus* for such prisoner returnable immediately before himself or any other of the judges; and upon the return made shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court (*g*).

NOTE TO
DARNELL'S
CASE.
31 CAR. 2,
c. 2.

That any writ of *habeas corpus* granted under the Act shall be indorsed as granted in pursuance of it, and signed by the person awarding the same (*g*).

That any officer or keeper neglecting to make a due return, or not delivering to the prisoner or his agent within six hours after demand a copy of the warrant of commitment, or shifting the custody of a prisoner from one to another without sufficient reason or authority (specified in the Act (*h*)), shall for the first offence forfeit 100*l.*, and for the second offence 200*l.*, to the party grieved, and be disabled to hold his office (*i*).

That no person once delivered by *habeas corpus* shall be recommitted for the same offence otherwise than by the legal order of the court wherein he may be bound by recognizance to appear or having jurisdiction of the cause, under penalty of forfeiting 500*l.* to the party grieved (*k*).

That every person committed for treason or felony shall, if he requires it, the first week of the next term or the first day of the next session of oyer and terminer, be indicted in that term or session or else admitted to bail, unless it appear upon affidavit that the witnesses for the prosecution could not be produced the same term, sessions, or gaol delivery; and if acquitted or if not indicted

(*f*) S. 4. The limitation imposed by this section applies only to the statutory writ. *Per* Lord Eldon, C., 2 Swanst. 70, 72.

(*g*) S. 3; *Re Newton*, 13 Q. B. 716, 733.

(*h*) S. 9.

(*i*) S. 5.

(*k*) S. 6. As to the meaning of this sec. see *Att.-Gen. of Hong Kong v. Kwok-a-Sing*, L. R. 5 P. C. 179; 42 L. J., P. C. 64.

NOTE TO
DARNEL'S
CASE.

31 Car. 2,
c. 2.

and tried in the second term or session after commitment, the prisoner shall be discharged from his imprisonment for the offence imputed to him (*l*). But that no person after the assizes have been opened for the county in which he is detained shall be removed from gaol by *habeas corpus* granted in pursuance of the Act, but upon any such writ shall be brought before the judge of assize in open court, who is thereupon to do what to justice shall appertain (*m*).

Such prisoner was also empowered (*n*) to obtain the writ out of any one of the superior courts, (*o*) whose jurisdiction is now transferred to the High Court of Justice (*p*); and the Lord Chancellor or any judge denying the same on sight of a copy of the warrant, or upon oath that the same is refused, is liable to forfeit to the party aggrieved the sum of 500*l*.

This statutory writ of *habeas corpus* runs to any place in England or Wales, to the town of Berwick-upon-Tweed, and the islands of Jersey and Guernsey (*q*).

Further, as remarked by Mr. Emlyn (*r*), because all these precautions in favour of liberty might be rendered useless, by sending the subject to some remote or private prison whereby he might lose the benefit of the king's commission of gaol delivery, and the king's writs be ren-

(*l*) S. 7; *R. v. Bowen*, 9 Car. & P. 509.

(*m*) S. 18.

(*n*) S. 10.

(*o*) The writ of *habeas corpus ad subjiciendum* did not at common law issue out of the Exchequer or Common Pleas, unless for officers of such court or persons privileged. In *Bushell's Case*, 6 St. Tr. 1021, however, it was held that the Court of Common Pleas might issue the writ on behalf

of a person not privileged, and, if it appeared on the return thereto that the imprisonment was against law, discharge the prisoner. Bac. Abr. vol. iv. pp. 117, 118; *per* Lord Eldon, C., 2 Swanst. 65, citing *Wood's Case*, 2 W. Bla. 745, and *R. v. Wilkes*, 2 Wils. 151.

(*p*) *Ante*, p. 212 (*q*).

(*q*) S. 11. See *per* Lord Mansfield, C.J., *R. v. Cowle*, 2 Burr. 855.

(*r*) 1 St. Tr., Pref. xxvii.

dered ineffectual for want of knowing whom to direct them to—the statute has provided, That no inhabitant of England (except a person contracting (s) or sentenced (t) to be transported, or having committed some capital offence in the place to which he is sent for trial (u)) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any place beyond the seas within or without the king's dominions, on pain that the party committing, his advisers, aiders, and assistants shall forfeit to the party aggrieved a sum not less than 500*l.*, to be recovered by action, with treble costs; shall be disabled to bear any offices of trust or profit; shall incur the penalties ordained by the statute of *præmunire* (x); and shall be incapable of the king's pardon (y).

NOTE TO
DARNEL'S
CASE.

31 CAP. 2,
c. 2.

The above celebrated statute—aided by the Bill of Rights, which declared that “excessive bail ought not to be required”—did not, it has been remarked (z), enlarge our liberties, it only rendered them more secure (a). Its operation, moreover, was restricted to cases of commitment for “criminal or supposed criminal matters.” And to the expediency of this restriction

(s) S. 13.

(t) S. 14.

(u) S. 16.

(x) 16 Ric. 2, c. 5.

(y) S. 12.

(z) 3 Hallam, Const. Hist. Eng., p. 12.

(a) Although the statute certainly went far towards preventing the possibility of continuous imprisonment being suffered by one accused of crime without trial, yet in the case of Major Bernardi (13 St. Tr. 759), one notable instance presents itself, where parliament, by a suc-

cession of special enactments, caused to be imprisoned for the term of life one, who had not been tried for the treason of which he was suspected, and against whom no sufficient evidence would seem to have been available on behalf of government. For supposed complicity in the assassination plot against William 3 (A.D. 1695), this unhappy man was detained in prison, without bail and without trial, by the direct authority of parliament and the Crown for a period of forty years.

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DARNEL'S
CASE.
Defects in
Habeas
Corpus Act.

the attention of parliament was in the year 1758 specially directed. It chanced that a person having been impressed into the king's military service (under the provisions of a statute (*b*) passed in the preceding session) and confined in the Savoy, had applied through his friends for a *habeas corpus*, whereupon a question arose whether such writ could, under the statute of Charles II., be granted. Before the question thus raised could be determined, the applicant was discharged from custody by order of the Secretary of War; but, nevertheless, to remedy the defect supposed to have been detected in the *Habeas Corpus* Act, a Bill was passed by the Commons designed to extend the operation of the Act "to all cases where any person not being committed or detained for any criminal or supposed criminal matter" shall be confined or restrained of his liberty under any colour or pretence whatsoever (*c*). When the Bill thus passed by the Commons came before the Lords, a series of questions was proposed to the judges (*d*), of which the following are material: 1. Whether, in cases not within the stat. 31 Car. 2, c. 2, the *habeas corpus ad subjiciendum* ought by law to issue of course, or upon probable cause verified by affidavit? To this question the judges replied that the writ ought not to issue of course. 2. Whether the said statute applied to the case of one impressed? To which question the answer was likewise in the negative, though Mr. Justice Bathurst thought that in favour of liberty the like relief had been extended by the Court of King's Bench to other cases. 3. Whether the judges are in all cases so bound by the facts set forth

(*b*) 30 Geo. 2, c. 8.

(*c*) See Cobbett, Parl. Hist. Eng., vol. xv. pp. 871 *et seq.* *Ante*, p. 113, n. (*u*).

(*d*) Cobbett, Parl. Hist. Eng., vol. xv. pp. 898 *et seq.*; Wilmot's opinions, 77; Bac. Abr. vol. iv. p. 140.

in the return of a *habeas corpus* that they cannot discharge a prisoner brought up before them, although it should manifestly appear that such return is false in fact, and that the person so brought up is restrained of his liberty by unwarrantable means and in direct violation of law and justice? By way of answer to this question, five of the judges traversed it in terms, whereas by others an opinion was expressed that, although the return could not be questioned on affidavit, yet, if shown by the verdict of a jury to be false, the person in custody might be discharged.

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DARNEL'S
CASE.

Notwithstanding a difference of opinion amongst the judges thus elicited in regard to the great constitutional remedy under our notice, and although the expediency of further legislation respecting it was recognized, a long interval elapsed before parliament definitely announced its will in this matter by enacting the 56 Geo. 3, c. 100, intituled "An Act for more effectually securing the liberty of the subject." This statute applies where any person is confined or restrained of his liberty (otherwise than for some criminal or supposed criminal matter, and except persons imprisoned for debt or by process in any civil suit) within England, Wales, the town of Berwick-upon-Tweed, or the isles of Jersey, Guernsey, or Man, and enacts,—That a judge of any of the superior courts, upon complaint made, if it shall appear by affidavit or affirmation (where allowed by law) that there is a probable and reasonable ground for such complaint, shall award in vacation time a writ of *habeas corpus ad subjiciendum* directed to the person in whose custody or power the party restrained of liberty may be, returnable immediately before himself or any other judge of the same court (e).

—Remedied
by 56 Geo. 3,
c. 100.

(e) S. 1. *Ante*, p. 212 (q).

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CASE.

That wilful disobedience to such writ shall be deemed a contempt of court and punishable accordingly (*f*). That in all cases provided for by the Act, although the return to the writ be good and sufficient in law, it shall be lawful for the judge before whom it is returnable to proceed to examine into the truth of the facts set forth in such return by affidavit or affirmation (when allowed by law) and to do therein as to justice shall appertain; and if it shall appear doubtful to him whether the material facts set forth in the return be true, the prisoner shall be bailed (*g*). That the provisions of the Act for making the writ returnable in term or vacation, and making disobedience to it a contempt of court, shall extend to writs awarded under the 31 Car. 2, c. 2 (*h*).

25 Vict. c. 20. The course of direct legislation in regard to the writ of *habeas corpus* terminates with the stat. 25 Vict. c. 20, passed in consequence of the decision of the Court of Queen's Bench in *Anderson's Case* (*i*), where the writ was issued into Upper Canada. This statute enacts (*k*):—That “no writ of *habeas corpus* shall issue out of England by authority of any judge or court of justice therein, into any colony or foreign dominion (*l*) of the Crown where her Majesty has a lawfully established court or courts of justice, having authority to grant and issue the said writ, and to ensure the due execution thereof throughout such colony or dominion.”

The writ of
habeas corpus

Abstaining from inquiry into practical details (*m*) (which

(*f*) S. 2.

(*g*) S. 3. *Ex parte Beeching*, 6 D. & R. 209; 4 B. & C. 136.

(*h*) S. 6.

(*i*) *In re Anderson*, 3 E. & E. 487; S. C. 30 L. J., Q. B. 129.

(*k*) S. 1.

(*l*) This does not include the Isle of Man; *Re Brown*, 5 B. & S. 280; S. C. 33 L. J., Q. B. 193.

(*m*) The Extradition Act, 1870 (33 & 34 Vict. c. 52, s. 11), provides

would be alien to the design of this volume) respecting the writ of *habeas corpus*, a glance at the previous pages will suffice to show that this great constitutional remedy rests upon the common law (*n*) declared by Magna Carta and the statutes which affirm it; rests, likewise, on specific enactments ensuring its efficiency, extending its applicability, and rendering more firm and durable the liberties of the people. This remedy is available against the Crown (*o*), is grantable in all cases civil as well as criminal (*p*), in vacation as well as during the regular sittings of the court (*q*), it runs (subject to the statutory qualification above mentioned) into the colonies and dependencies of the Crown (*r*), and the right to claim it cannot be suspended, even for one hour, by any means short of an Act of Parliament. Nor need mischief to our liberties be apprehended from the fact that in criminal cases the truth of the return to the writ in question cannot be traversed or denied (*s*), inasmuch as, besides the

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CASE.
—
sufficiently
protects
liberty.

that every person committed to prison under that Act shall be informed by the magistrate of his right to apply for a writ of *habeas corpus*; and a similar provision is contained in the stat. 44 & 45 Vict. c. 69, relating to the trial of Fugitive offenders.

(*n*) *Thomlinson's Case*, 12 Rep. 105; *Ex parte Besset*, 6 Q. B. 481, 486; 14 L. J., M. C. 17; *per* Lord Campbell, C.J., *Ex parte Sandilands*, 21 L. J., Q. B. 342; *Re Belson*, 7 Moo. P. C. C. 114.

(*o*) See the remarks as to the early history of the writ in the introduction to Mr. Fry's report of *The Canadian Prisoners' Case*, pp. 7, 9, 10.

(*p*) A writ of *habeas corpus*, however, "is not grantable in general

where the party is in execution on a criminal charge, after judgment on an indictment according to the course of the common law." Judgm., *Ex parte Lees*, E. B. & E. 836; *ante*, p. 216.

(*q*) *Leonard Watson's Case*, 9 Ad. & E. 731, 745, 780. See *Re Parker*, 5 M. & W. 32.

(*r*) *Re Belson*, 7 Moo. P. C. C. 114; *Carus Wilson's Case*, 7 Q. B. 984; *Crawford's Case*, 13 Q. B. 613; 18 L. J., Q. B. 225; *Re Brown*, 5 B. & S. 280; 33 L. J., Q. B. 193.

(*s*) *Leonard Watson's Case*, 9 Ad. & E. 731, 785, 794; *Corner, Cr. Off. Pr.* 116, 117; *sed vide per* Jervis, C.J., *Re Hakewill*, 12 C. B. 228.

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CASE.

remedy by action for a false return (*t*), the court will be "extremely careful that the facts should be truly stated to them;" and if they find that an untruth is put forward, may call upon the party making such statement to account for the untruth (*u*); in default of his doing so, they may issue process against him for contempt (*x*).

Prerogative
of pardon.

If, notwithstanding every precaution taken, every check applied by our law, justice should in any criminal proceeding be found to have been ill administered,—if, for instance, on a prosecution by indictment an erroneous verdict should have been given, and in virtue of the estoppel, so created, no remedy, by *habeas corpus* or otherwise, should be available (*y*), appeal may yet be made to the Crown for the exercise, conditional or absolute, of its prerogative of mercy (*z*), a prerogative which experience shows in our days to be exercised with a tender regard to the rights and interests of those who appeal to it. And we may accordingly conclude that personal liberty, the birthright of the subject, is by the constitution of this country efficiently assured and guarded (*a*).

(*t*) A party imprisoned, says Little-dale, J. (9 Ad. & E. 795), has, under the circumstances above supposed, "two modes of proceeding: either by action for false imprisonment or by application for a *habeas corpus*. In an action for false imprisonment the defendant must prove his justification, if any, and (except where allowed by express provision to give it under the general issue) he must also set forth the justification specially on the record. In the return to a *habeas corpus* no such minuteness of detail is necessary."

(*u*) *Per* Lord Denman. C.J., 9 Ad. & E. 794, 805.

(*x*) *Leonard Watson's Case*, *suprà*.

(*y*) *Re Newton*, 16 C. B. 97; 24 L. J., C. P. 148; see *Brenan's Case*, 10 Q. B. 492; *Crawford's Case*, 13 *Id.* 613.

(*z*) See *Dr. Groenvell's Case*, 1 Lord Raym. 213.

(*a*) As to the question which arose in *Reg. v. Paty and others*, 2 Lord Raym. 1105, 1116, whether error would lie on a judgment of the Queen's Bench remanding the prisoners who had been brought before the court on *habeas corpus*, *vide post*, Part III.; and see as to the jurisdiction of the Court of Appeal, *Reg. v. Weil*, 9 Q. B. D. 701.

§ 2. RIGHT OF PRIVATE PROPERTY.

Next in degree to the right of personal liberty is that of enjoying private property without undue interference or molestation. The king, says Plowden (*b*), is the head of the Commonwealth, and the office of the king is to preserve his subjects; and, again he says (*c*)—our common law, which allows many prerogatives to the king, yet will never suffer them to hurt others (*d*). It is, indeed, an essential principle of the law of England, “that the subject hath an undoubted property in his goods and possessions; otherwise there shall remain no more industry, no more justice, no more valour; for who will labour? who will hazard his person in the day of battle for that which is not his own?” (*e*). And, therefore, our customary law is not more solicitous of anything than “to preserve the property of the subject from the inundation of the prerogative” (*f*). With this doctrine may be associated—

THE BANKERS' CASE, 14 St. Tr. 1 (*g*).

(2 Will. & M.—12 Will. III. A.D. 1690-1696-1700.)

RIGHT OF PRIVATE PROPERTY.

The Crown having granted annuities to various persons in consideration of monies advanced to it: Held, that a remedy by petition to the Barons of the Exchequer was available to compel payment of such annuities by the Crown.

After the Restoration the Crown had frequently been

(*b*) Com. 315, a. The king “is bound of right by his laws to defend his subjects and their goods and chattels, lands and tenements.” 4 Rep. 126, a.

(*c*) Plowd. Com. 487.

(*d*) 2 Sid. 139.

(*e*) *The Bankers' Case*, by Turnor, 10.

(*f*) *Id.* 11.

(*g*) S. C., Skinner, 601; 5 Mod. 29; 1 Freem. 331.

THE
BANKERS'
CASE.

accommodated by bankers with loans of money, on the security of the public revenue; and, for repayment of such loans with interest, the practice had been to give tallies and orders on the Exchequer for paying principal and interest out of the first monies from the funds pledged as security. The good faith observed by the Crown had established so much confidence on the part of the bankers, that they lent their money without suspicion of seeing a misapplication of the revenues appropriated to repay them. Other circumstances, too, concurred to inspire confidence; for in 1667, the king issued a declaration, by which he solemnly promised, that he would not, "on any occasion whatever," suffer an interruption of payment on these orders of the Exchequer (*h*), which, moreover, about the same time, received the sanction of a statute (*i*) to make them transferable.

Although, however, the royal word had thus been definitely pledged, the bankers were finally deceived. In 1671, when the debt owing to them exceeded a million sterling, the king, having resolved on a new war with the Dutch, and knowing that parliament would be averse to the measure, in order to supply his necessities resorted to the expedient of closing the Exchequer; which was executed, by postponing payments there on orders before issued, with a very limited exception (*k*). At first the postponement of payment was only for a year; but it was afterwards continued so as to exclude the bankers from all hope of ever receiving the principal of their debt. These

(*h*) The words are, "We will not, upon any occasion whatsoever, permit or suffer any alteration, anticipation, or interruption to be made of our said subjects' securities; but that they shall from time to time receive the monies so secured unto them, in the same course and method as they were charged and ought to be satisfied. Which resolution we shall likewise

hold firm and sacred in all future assignments and securities, to be by us granted upon any other advance of money by any of our subjects upon any future occasion for our service." *The Bankers' Case*, by Turnor, 30.

(*i*) 19 Car. 2, c. 12.

(*k*) See the form of the order closing the Exchequer, *The Bankers' Case*, by Turnor, 138.

THE
BANKERS'
CASE.

proceedings involved the bankers in distress : nor was the mischief confined to them, great part of the monies they had lent to the Crown belonging to other persons ; so that the number of creditors to the bankers was computed to be near ten thousand. However, the king, in 1677, by way of relieving the bankers, granted them annuities out of the hereditary excise (*l*), equal to six per cent. interest on their several debts, redeemable on payment of the principal. This interest was accordingly paid till 1683. It then became in arrear, and continued so at the Revolution ; and thereupon suits were commenced to enforce payment of the arrears (*m*).

The proceeding was by petition to the Barons of the Exchequer for payment of arrears of the annuities granted ; whereupon two questions arose :

1st. Whether the grant of the king was good so as to bind his successors, and continue a charge upon the revenue ? Questions in the case.

2ndly. Whether the petitioners had adopted a proper remedy for recovery of the arrears ?

As to the first point it was objected, that the word “successors” in the statute by which this revenue was given, signified that it should be fixed in the Crown, and inalienable. To this it was answered, that by other statutes lands and revenues were given to the king by the same words as in this statute ; and yet the kings of England had always power to alien them (*n*). The king Arguments as to validity of grant.

(*l*) Granted to the Crown by stat. 12 Car. 2, c. 24, s. 15.

(*m*) In *Macbeath v. Haldimand*, 1 T. R. 176, Lord Mansfield, C.J., remarks on “the great difference” which “had arisen since the Revolution with respect to the expenditure of the public money. Before that period all the public supplies were given to the king, who, in his individual capacity, contracted for all

expenses. He alone had the disposition of the public money. But since that time the supplies have been appropriated by parliament to particular purposes, and now whoever advances money for the public service trusts to the faith of parliament.” See May, Parl. Prac. 9th ed. 638.

(*n*) *Willion v. Berkley*, Plowd. 234, where we read that “if land is

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as to validity
of grant.

was seised of an estate in fee of this revenue, and to such an estate a power of alienation is incident (*o*).

It was admitted, indeed, that the king could not grant away his kingdom, nor put it in vassalage or subjection to the pope or any other (*p*). And it was objected, that if the king should have a power to alien all his lands and revenues it might be of pernicious consequence to his subjects.

To such objection it was answered, that this might be reason to induce the making an Act of Parliament to restrain the king's power of alienation; but since the parliament had thought fit to give the king such a power, the court ought to acquiesce and submit to it. Moreover, the law has not such dishonourable thoughts of the king, as to imagine that he will do anything amiss to his people, where he has power so to do.

Further, it were absurd to restrain the king from aliening his revenues of which he is seised in fee. It is against the nature of a king, that he should have less power than his people. Before he was king he had power to alien, and now, when the crown has descended upon him, he is seised *in jure coronæ*; and shall he then have less power over those very lands than he had before the descent of the crown? Shall he be disabled to alien by being a king? (*q*). This would be against a common principle of law, that the descent of the crown takes away all disability (*r*).

Then, the doctrine contended for is repugnant to the constitution of a government. Suppose the kingdom should be in danger of being invaded; if the king could not raise money by alienating his revenue, the nation might perish; for he cannot otherwise raise money than by an Act of Parliament, for which there might not be

given to the king and to his heirs, he takes it in his body natural, and not in his body politic."

(*o*) Litt. s. 360.

(*p*) 4 Inst. 13.

(*q*) Plowd. 105; 2 Sid. 140; Co. Litt. 16, a.

(*r*) *Ante*, p. 16.

time : and heretofore, through fear of invasion, kings of England have borrowed money by mortgaging their lands (s).

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as to validity
of grant.

There ought also to be a power in all governments to reward persons that deserve well ; and it has been the constant usage of the kings of England to reward deserving persons out of the Crown revenues, by pensions, and estates to support their titles and dignities (t).

Then what reason can be given why some estates should be aliened, and others not ? Why may not the king as well alien these estates as he may the flowers of his crown ? (u). For he may grant a county palatine, which has *jura regalia* ; so he has granted a power to pardon treason or felony, &c. These prerogatives indeed are reassured to the crown by statute (x), but the grants were not void.

Then if an estate be settled on a subject by Act of Parliament, it will not be denied but that he may alien such estate ; and why shall not the king have the same privilege ? It appears in fact, that he has always done it. So all the lands that belonged to the abbeys and monasteries were aliened by the king, and yet they were given to him by Act of Parliament, and by general words, as here. So the customs have been always granted and charged by the king, and yet they were granted to him by Act of Parliament (y).

But it is objected, that this revenue was given (z) in lieu of inheritances that were inalienable, viz., the wards,

(s) Cotton's Posthuma, 179.

(t) 7 Rep. 12, a. See the preamble to stat. 34 Hen. 8, c. 20.

By stat. 1 Ann. st. 1, c. 7, s. 5, the alienation of Crown lands was restricted, and subsequent statutes have since been enacted for a like purpose. Chitty, Prerog. Cr. 203 ; see 25 & 26 Vict. c. 37 ; 36 & 37 Vict. c. 61.

(u) *Abbot of Strata Marcella's Case*, 9 Rep. 24.

(x) 27 Hen. 8, c. 24.

(y) See the stat. 31 Hen. 8, c. 13, entitled "An Act for Dissolution of Monasteries and Abbeys ;" 32 Hen. 8, c. 24 ; 4 Inst. 44 ; *The Case of Customs*, Davis, 7.

(z) By. stat. 12 Car. 2, c. 24.

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liveries, purveyances, &c. Yet how can the nature of these inheritances affect inheritances of another kind? And even these inheritances were always in effect alienable, for they might have been released.

Lastly, the king was not deceived in his grant, and the consideration for it being executed, though it were false, the grant cannot be avoided (*a*).

Remedy by
Petition.

Secondly, a majority of the judges held that a proper remedy had been adopted by the petitioners.

Upon this latter point the Lord-Keeper Somers—holding in an elaborate judgment, which it would be useless here to reproduce (*b*), that the Barons of the Exchequer had no power or control over the king's treasury, and that the only remedy available was by petition to the king himself—reversed the judgment of the court below (*c*). This judgment of reversal was afterwards itself reversed by the House of Lords. However, notwithstanding this final decision in favour of the bankers and their creditors, it appears that they eventually received only one half of their debt; the stats. 12 & 13 Will. 3, c. 12 and c. 15, after appropriating certain sums out of the hereditary excise for public uses, providing that, in lieu of the annuities granted to the bankers and all arrears, the hereditary excise should, after the 26th of December, 1701, be charged with

(*a*) Plowd. 554.

(*b*) *Vide post*, p. 240; 14 St. Tr. 39.

(*c*) On the impeachment of Lord Somers by the House of Commons, A.D. 1701, the fourteenth article charged that he had, of his own authority, reversed judgments given in the Court of Exchequer, and without calling before him the Barons of the Exchequer to hear their informations and the causes of their judgments, as the statute (31 Edw. 3, st. 1, c. 12) in those cases expressly

directs; assuming thereby to himself an arbitrary and illegal power: and had declared and affirmed, in public places of judicature, that particular subjects might have rights and interests without any remedy for recovery of the same unless by petition to the person of the king only, or to that effect: which position was highly dangerous to the legal constitution of this kingdom, and absolutely destructive to the property of the subject. 14 St. Tr. 261. See Lord Somers's answer to the above article, *Id.* 274.

annual sums equal to an interest of three per cent., till redeemed by payment of one moiety of the principal sums (d).

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That no man's property can legally be taken from him or invaded by the direct act or command of the sovereign, without the consent of the subject, given expressly or impliedly through parliament, is "*jus indigenæ*, an old home-born right, declared to be law by divers statutes of the realm" (e). Thus, in the charter of William the Conqueror (f), which ratified the laws of King Edward the Confessor, from whom his asserted title was derived, we find these remarkable and sterling words:—*Volumus ac firmiter præcipimus et concedimus ut omnes liberi homines totius monarchiæ regni nostri habeant et teneant terras suas et possessiones suas bene et in pace—libere ab omni exactione injustâ, et ab omni tallagio*. And then the charter goes on to declare that nothing shall be exacted or taken from the subject except only his free or knight's service, due and of right owing to the Crown. Such was the recognition of the right of private property by the Crown in the 11th century; and a learned writer, whose treatise has been already cited (g), collects precedents from that early period of our history to show that although this "vital law of property" has often been infringed, yet as often has parliament interposed to relieve the public liberty so endangered, and to repair the inroads on the constitution so made. It has, *inter*

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vasion by
the Crown.

(d) See also the stats. 3 Geo. 1, c. 7, and 13 Geo. 1, c. 3; 5 Mod. 62, n. (a).

(e) *Per* Yelverton, *arg.* 6 St. Tr. 484. See also *per* Lord Camden, C.J., *Entick v. Carrington*, *post*,

Part II.

(f) *Ancient Laws and Institutes of England*, 211.

(g) *The Bankers' Case*, by Turnor, 35-51, 56-82.

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alia, been declared or resolved, that no freeman shall be disseised of his freehold (*h*); that no man's "lands, tenements, goods, nor chattels" shall "be seized into the king's hands against the form of the great charter, and the law of the land" (*i*); that "it is the ancient and indubitable right of every freeman, that he hath a full and absolute property in his goods and estate" (*k*); that neither his majesty nor his privy council have, or ought to have, any jurisdiction, power, or authority in any arbitrary way to determine or dispose of the lands, tenements, hereditaments, goods, or chattels of any of the subjects of this kingdom, but that the same ought to be tried and determined in the ordinary courts of justice, and by the ordinary course of the law (*l*); and that the laying of excessive fines is illegal (*m*).

Illustrations
of doctrine.

That the sovereign cannot invade the property of the subject, is indeed a "home-born" doctrine declared by many statutes, and parcel of our unwritten law. We find it thus exemplified:—Where there is a custom to pay toll for all cattle driven over a common bridge, this custom will bind the subject but not the king; where, however, a custom is to pay toll for all cattle that shall be driven over a man's private freehold, there the custom shall prevail against the prerogative—because our law will not allow the king to invade the subject's inheritance and property without consent and compensation (*n*). So if the king grant an estate to a man which he or his predecessors had already granted to some one else, the

(*h*) Magna Charta, chap. 29.

(*i*) 5 Edw. 3, c. 9; 25 Edw. 3, st. 5, c. 4; 28 Edw. 3, c. 3.

(*k*) Resolution of the House of Commons in *Darnel's Case*, 3 St. Tr. 83.

(*l*) 16 Car. 1, c. 10, s. 5.

(*m*) *Post*, s. 3.

(*n*) *The Bankers' Case*, by Turnor, 11, 12; Plowd. 236; 2 Inst. 221; Chitt. Prerog. Cr. 195, 377. See *Westover v. Perkins*, 28 L. J. M. C. 227.

king will be held to have been deceived in the later grant, and it will be void, for *quod alienum est, dare non potest rex per suam gratiam* (o). In the *Case of Alton Woods* (p), we read that if the king makes a lease for years or for life, and afterwards grants the land to another in fee or in tail, without reciting the lease, the last grant is void. 1st. Because the king grants an estate in possession when he hath but a reversion, and so is deceived in his grant. 2ndly. It is not honourable for the king to grant the same possession to one which he or his progenitors have granted to another, for *vendens eandem rem duobus falsarius est* (q).

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But if the king grants the herbage and pannage of the park of C. to A. for life, and afterwards, the king reciting the grant to A., and that he is living, grants the herbage and pannage of the said park to B. for his life, without showing when such latter grant is to begin, the grant to B. is good (r), for here "the king mistook nothing, nor took upon him to grant that which he could not grant, nor was deceived in any part of his grant, and when the king's charter may be taken to two intents good, in many cases it shall be taken to such intent as is most beneficial for the king; but if it may be taken to one intent good, and to another intent void, then for the king's honour and for the benefit of the subject, it shall be taken in such a manner as the king's grant may take effect, for it was not the king's intent to make a void grant" (s).

(o) 3 Inst. 236; 4 *Id.* 88.

(p) 1 Rep. 45, a.; *Earl of Rutland's Case*, 8 Rep. 55, a.; *Alcock v. Cooke*, 5 Bing. 340; Judgm., *Morgan v. Seaward*, 2 M. & W. 561.

(q) Nor can the Crown give to the grant of a dignity or honour a quality

of descent unknown to the law. *Wiltes Peerage Case*, L. R. 4 H. L. Cas. 126, 152; *Buckhurst Peerage Case*, 2 App. Cas. 20.

(r) *Earl of Rutland's Case*, 8 Rep. 55, a.

(s) 8 Rep. 56, a.

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where it may
be avoided.

Cases in which a grant from the Crown has been held to be avoided by reason of misdescription or mistake, are reducible to three classes:—1st. Where the king has by his grant professed to give a greater estate than he had himself in the subject-matter of the grant. 2ndly. Where the king has already granted the same estate, or part of the same estate, to another. 3rdly. Where the king has been deceived in the consideration expressed in his grant (*t*). And the rules of construction applicable to a grant from the Crown, should it *primâ facie* seem to fall within one or other of the above classes, have been thus judicially laid down (*u*):—"If the king has been deceived by any false suggestion as to what he grants, or the consideration for his grant; if he appears to have been ignorant or misinformed as to his interest in the subject-matter of his grant; if the language of his grant be so general that you cannot in reason apply it to all that might literally fall under it; or if it be couched in terms so uncertain that you cannot tell how to apply it with that precision which grants from one so specially representing the public interest ought in reason to have; or if the grant reasonably construed would be injurious to the vested interests of other subjects (*x*), or would work a wrong or something contrary to law; in these, and such like cases, the grant would be either wholly void or restrained according to circumstances; and equally so whether the technical words *ex certâ scientiâ et mero motu* be used or not. To hold the grants valid and unre-

(*t*) Judgm., *Gledstanes v. Earl of Sandwich*, 4 M. & Gr. 1028, 1029.

(*u*) *Per* Coleridge, J., *Reg. v. Eastern Archipelago Co.*, 1 E. & B. 337, 338, and cases there cited;

Hills v. London Gaslight Co., 5 H. & N. 340.

(*x*) *R. v. Butler*, 3 Lev. 220; *per* Parke, B., *Eastern Archipelago Co. v. Reg.*, 2 E. & B. 894.

strained, in such cases, would be *in deceptione domini regis*, and not *secundum intentionem*."

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What has been above set forth may be illustrated by reference to a grant by the Crown (1) of a market, (2) of a charter, which concedes commercial privileges.

The claim to a market, observes Sir W. Blackstone (y), Grant of market. can only be set up by virtue of the king's grant, or by immemorial usage and prescription which presupposes such a grant; if a new market be held within seven miles of that existing by grant or prescription, a nuisance remediable by action will be thus constituted (z). If, then, a municipal or other corporation have by prescription a right of market, it will not be competent to the Crown by charter to restrict itself from granting to any other subject the like privilege within an area greater than that which by the common law attaches to the grant of a market; neither will it be competent to the Crown to establish a new market to be held at the same times within the common law distance from the old market, nor would the convenience of the public alone warrant such a grant (a), for in the former case the public, in the latter case the owners of the original market, might be injured.

The great *Case of Monopolies* (b), *temp.* Queen Elizabeth, exhibits forcibly the authority of our law when in conflict with an assumed prerogative, and the tenderness Grant of charter for trade purposes.

(y) 1 Com. 274. A market may exist in virtue of a royal ordinance without being granted to any one in particular. Chitty, Prerog. Cr. 193.

(z) 1 Steph. Com. 662; *Yard v. Ford*, 2 Saund. 172.

(a) *In the matter of the Islington Market Bill*, 3 Cl. & F. 513; S. C. 12 M. & W. 20, n.; see *Mayor of Exeter v. Warren*, 5 Q. B. 773;

Goldsmid v. Great Eastern Railway Co., 25 Ch. D. 511; 53 L. J. Ch. 371.

(b) *Darcy v. Allain*, 11 Rep. 84. By the stat. 21 Jac. 1, c. 3, the granting of monopolies by the Crown was declared to be illegal unless subject to the limitations expressed in the Act. By its prerogative the Crown has the exclusive right of printing certain books, and its gran-

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shown by it when dealing with royal attributes. A grant by the Crown for the sole making of playing-cards within the realm was there adjudged void, inasmuch as "the sole trade of any mechanical artifice, or any other monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all other subjects, for the end of all these monopolies is for the private gain of the patentees." The queen therefore was held to have been deceived in her grant.

The validity of letters patent from the Crown for exclusive trading was discussed at length in *The East India Company v. Sandys* (c), where, to use the words of the then Chief Justice (Jefferies), the king's prerogative and the privilege of the East India Company were concerned on the one side, and the benefit of particular persons and the liberty of free-trading on the other. It is, said he, a great act of condescension in the king to this defendant, "that he does permit this point of his prerogative to be disputed in Westminster Hall; but by this he does sufficiently signify to all his subjects that he will persist in nothing, though it seem never so much for his advantage, but according to the laws of the land." In this case the prerogative (as might have been anticipated) was upheld.

Although the king may, by his letters patent, create a corporation for trading purposes, and give them an exclusive right to trade and hold land within prescribed limits, yet a clause contained therein prohibiting others to trade within such limits unless by licence first had, under pain of imprisonment and forfeiture, and loss both of ships and goods wheresoever found, with power to enter into,

tees enjoy like privileges. Godson, also *Campbell v. Hall*, 29 St. Tr. Patents, pp. 432-448. 239, cited *post*.

(c) 10 St. Tr. 371, 454, 522. See

search, and seize such ships and goods, one moiety of the forfeiture to go to the king, the other to the company, is void; because the king cannot by letters patent create a forfeiture of, or by his own act confiscate, a subject's property, for, as argued in the case abstracted (*d*), "the kings of England have always claimed a monarchy royal, not a monarchy seignoral. Under the first the subjects are freemen, and have a property in their goods and freehold in their lands; but under the latter they are villeins and slaves" (*e*); nor was this right of property "introduced into our land as the result of princes' edicts, concessions, and charters, but was the old fundamental law springing from the original frame and constitution of the realm (*f*). *Quod nostrum est sine facto sive defectu nostro amitti, seu ad alium transferri, non potest* (*g*).

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Cases as to
validity of
Crown
grants.

Doubtless in the six centuries or so which intervened between the two great declarations—the one by the sovereign, the other by the legislature, cited at a former page (*h*)—aggressions by the Crown upon private property did occur. Yet amidst the protestations of the Commons, and apologies of the sovereign in respect of such aggressions, certainly no legal precedent justifying them was established (*i*). It is true that the curious reader may discern in the older reports and treatises traces of one branch of the prerogative, which does seem in some slight degree to trench upon the right of private property. In the *Case of the King's Prerogative in Saltpetre* (*k*), we read that by the common law every man

(*d*) *Nightingale v. Bridges*, 1 Show. 135. "No forfeiture can grow by letters patent." 2 Inst. 47.

(*e*) Davis, 40, 41.

(*f*) Arg. 1 Show. 138.

(*g*) *Fraunces's Case*, 8 Rep. 92, a.

(*h*) *Ante*, pp. 231, 232.

(*i*) *The Bankers' Case*, by Turnor, 56 *et seq.*

(*k*) 12 Rep. 12.

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Nature of
remedy
available
against the
Crown.

may come upon my land for the defence of the realm (*l*), or to dig gravel for the raising of bulwarks upon it, and so forth (*m*), for "this is for the public good, and every one hath benefit by it," and, subject to restrictions, the king may dig for saltpetre or for treasure-trove in the land of the subject; for, *princeps et respublica ex justâ causâ possunt rem meam auferre* (*n*).

The Crown submits, as is abundantly proved by the cases already cited, to have its prerogatives openly discussed and investigated in courts of justice, and allows a remedy against itself for any infringement of the subject's right, provided such remedy be sought for where it can be had. The constitution of England, says Lord Holt (*o*), "has wisely distributed to several courts the determination of proper causes, but has left no subject in any case where he is injured without his adequate remedy, if he will go to the right place for it." If the subject has cause of complaint against the Crown, he must proceed for redress by that pathway which the constitution has laid out for him; for an illegal invasion of his liberty he should proceed by *habeas corpus*; to obtain the revocation of a grant which injuriously affects him, he should proceed by *scire facias* (*p*); for an illegal invasion of the

(*l*) *The Bankers' Case*, by Turnor, 71, 72; per Buller, J., *Cust Plate Co. v. Meredith*, 4 T. R. 797.

(*m*) See *The Case of Mines*, Plowd. 316; 1 Bla. Com. 295; and see per Cockburn, C.J., *Greenwich Board of Works v. Maudslay*, L. R. 5 Q. B. 401.

(*n*) 12 Rep. 13.

(*o*) 14 St. Tr. 784.

(*p*) 4 Inst. 88; Chitty, Prerog. Cr., chap. 12, s. 3. "To every

Crown grant there is annexed by the common law an implied condition, that it may be repealed by *scire facias*, by the Crown, or by a subject grieved using the prerogative of the Crown upon the fiat of the Attorney-General." Per Jervis, C.J., 2 E. & B. 914. By stat. 46 & 47 Vict. c. 57, s. 26, this proceeding is abolished in so far as it relates to patents for inventions.

right of property, he should proceed by Petition of Right (*q*),—speaking of which latter remedy, Sir W. Blackstone (*r*) tells us that the law has thus furnished the subject with a “decent and respectful” mode of informing the king of a grievance, and soliciting redress.

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This mode of procedure is appropriate where the Crown has through misinformation or inadvertence possessed itself of the lands, goods, or money of a subject; the object of the petition being to obtain restitution, or compensation, where restitution cannot be made. It is also appropriate where the claim arises out of a contract, as for goods supplied to the Crown or for the public service (*s*).

Petition of
Right—
when
available.

In the principal case, Treby, C. J., and Lord Somers, held (*t*) (though this opinion was afterwards overruled by the House of Lords), that the remedy by petition to the Barons of the Exchequer was not available; that it was not competent to them to direct in what order monies in the Exchequer should be disbursed. Both the learned persons named expressed, however, an opinion (*u*), that on the facts appearing in *The Bankers’*

(*q*) *Monstrance de droit* was an analogous remedy, now obsolete, available for the subject where the king’s title had been found by office or appeared by matter of record. Chitty, Prerog. Cr. 352, 356.

(*r*) 3 Com. 255; 3 Steph. Com. 662.

(*s*) See *per* Cockburn, C. J., *Feather v. Reg.*, 6 B. & S. 294; 35 L. J. Q. B. 200.

Semble. It might be made available for recovery of a legacy. *Ryves v. The Duke of Wellington*, 9 Beav. 579, 600.

See further as to this mode of procedure, *The Baron de Bode v. Reg.*, 3 H. L. Cas. 449; note to *Smith v. Upton*, 6 M. & G. 251; *Tobin v. Reg.*, 16 C. B. N. S. 310; *Churchward v. Reg.*, 6 B. & S. 807; L. R. 1 Q. B. 173; *Reg. v. Commissioners of Inland Revenue*, 12 Q. B. D. 478; 53 L. J. Q. B. 229; *Rustomjee v. Reg.*, 2 Q. B. D. 69; 46 L. J., Q. B. 238; and note to *Sutton v. Johnstone*, *post*.

(*t*) 14 St. Tr. 26, 105.

(*u*) *Per* Treby, C. J., 14 St. Tr. 28.

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Right—
when avail-
able.

Case a remedy was open by Petition of Right to those aggrieved (*x*)—various authorities being adduced by Lord Somers (*y*), establishing that where the subject seeks to recover a rent or annuity or other charge from the Crown, whether it be a rent or annuity originally granted by the king, or issuing out of lands which, by subsequent title, came to be in the king's hands, the remedy by petition to the person of the king is available.

Viscount
Canterbury
v. Attorney-
General.

In *Viscount Canterbury v. Attorney-General* (*z*), compensation was claimed from the Crown for damage alleged to have been done in the preceding reign to property of the petitioner, whilst Speaker of the House of Commons, by the fire, which, in 1834, destroyed the two Houses of Parliament; and the main question was, whether, assuming that the persons whose negligence caused the fire were the servants of the Crown, the sovereign was responsible for the consequences of their negligence. The Crown was held not to be thus responsible; and in the course of the argument was cited this proposition (*a*)—that the king cannot, in his own person, arrest a subject, though his servant might; because if the arrest were wrongful, the subject could not have his action against the king, whereas the servant would in that case be liable, although the act were done in the presence of the king, and by his authority. "It is admitted," said Lord Lyndhurst, C., "that for the personal negligence of the sovereign, neither this nor any other proceeding can be maintained. Upon what ground, then, can it be supported for the acts of the agent or servant? If the master or employer is answerable upon the principle *qui*

(*x*) See Lord Campbell's *Lives of the Chancellors*, vol. iv. p. 116.

(*y*) 14 St. Tr. 80 *et seq.*

(*z*) 1 Phill. 306.

(*a*) 2 Inst. 186; *Prohibitions del Roy*, 12 Rep. 63.

facit per alium facit per se, this would not apply to the sovereign, who cannot be required to answer for his own personal acts. If it be said that the master is answerable for the negligence of his servant (b) because it may be considered to have arisen from his own misconduct or negligence in selecting or retaining a careless servant, that principle cannot apply to the sovereign, to whom negligence or misconduct cannot be imputed, and for which, if they occur in fact, the law affords no remedy." This reasoning proceeds directly upon the principle that "the king can do no wrong." In *Viscount Canterbury's Case*, however, another obstacle existed to redress, which was likewise held to be fatal. The cause of complaint arose in the time of King William IV.—the proceeding in question was instituted against his successor (c). "It is true," observed Lord Lyndhurst, "that the king never dies—the demise is immediately followed by the succession—there is no interval. The sovereign always exists—the person only is changed. But if there be a change of person, why is the personal responsibility arising from the negligence of servants (if indeed such responsibility exists) to be charged upon the successor, ceasing as it does altogether in the case of a private individual? In the case of a subject, the liability does not continue in respect of the estate; it devolves neither upon the heir nor upon the personal representative—it is extinct." But besides the questions thus disposed of in favour of the Crown, a third question arose in the case cited, which is pertinent to the present subject—was the remedy by Petition of Right

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Right—
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(b) As showing that the Crown cannot be prejudiced by the misconduct or negligence of its officers, see further *Reg. v. Renton*, 2 Exch. 216,

220, and notes to *Entick v. Carrington*, and *Sutton v. Johnson*, *post*.

(c) See *The Att.-Gen. v. Köhler*, 9 H. L. Cas. 651.

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Petition of
Right—
not available
in respect of
tortious act.

available to the suitor? “Staundford” (*d*), remarked Lord Lyndhurst (*e*), “speaks of this procedure as applicable to the illegal seizure by the king of the lands or goods of a subject; he does not say that it would be applicable for enforcing a claim for damage caused by the negligence of the Crown or its servants, nor does it appear that any sufficient authority, or any valid precedent in favour of such position is forthcoming.” And, indeed, as observed by the Court of Common Pleas in *Tobin v. The Queen* (*f*), “the notion of making the king responsible in damages for a supposed wrong tends to consequences that are clearly inconsistent with the duties of the sovereign.”

Petitions of
Right Act,
1860.

The Procedure on Petition of Right is now regulated by the stat. 23 & 24 Vict. c. 34. The petition may, if the suppliant think fit (*g*), be entitled in any Division of the High Court of Justice in which the subject-matter, or any material part thereof, would have been cognizable if the same had been a matter in dispute between subject and subject (*h*), and, so far as applicable, the practice and course of procedure (*i*) in an action or suit between subjects shall extend to Petitions of Right (*j*), provided that nothing in the Act contained “shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of the Act” (*k*).

(*d*) Prerog. Cr. chap. 15, p. 42.

(*e*) 1 Phill. 234, 235.

(*f*) 33 L. J., C. P. 206; see also *Feather v. Reg.*, 35 L. J. Q. B. 208, and note to *Sutton v. Johnson*, *post*.

(*g*) By sec. 18 nothing in the Act contained shall prevent any suppliant from proceeding as before the passing of the Act.

(*h*) Sec. 1. See *Re Holmes*, 2

Johns. & H. 527.

(*i*) See *Kirk v. Reg.*, L. R. 14 Eq. 558; *Thomas v. Reg.*, L. R. 10 Q. B. 44; 44 L. J. Q. B. 17; *Tomline v. Reg.*, 4 Ex. D. 252; 48 L. J., Ex. 453.

(*j*) 23 & 24 Vict. c. 34, s. 7.

(*k*) Sec. 7. The procedure in petitions of right is not affected by the Jud. Acts, 1873 or 1875; but see 44 & 45 Vict. c. 59, s. 6.

In the important case of *Thomas v. The Queen* (l), reliance was placed upon the 7th Sect. of the above-mentioned Act, in support of the argument that a petition of right would only lie for specific chattels or land—that it would not lie for the breach of a contract made by an authorised agent of the Crown—it being contended that no such proceeding could have been maintained before the Act. The Court of Queen's Bench, however, basing their judgment mainly on the authority of *The Bankers' Case* (m), held that such a proceeding lay, even at common law, to recover money claimed by way of debt, or by way of unliquidated damages on breach of contract by an authorised agent of the sovereign.

It has indeed been held by the Court of Queen's Bench (n) that a *mandamus* might be granted against public officers, who, having received money under the provisions of an Act of Parliament, as trustees for an individual, refuse to pay it over to him, or annex conditions to such payment which they have no right to make. But this decision cannot now be considered to be law, the Court of Appeal having recently expressed disapproval of it (o), on the ground that since the very principle on which it was decided involved the existence of another remedy, namely that of Petition of Right which might be resorted to, the case did not fall within the rule laid down by Lord Mansfield (p) that “where there is no specific remedy the Court will grant a *mandamus*—precludes *mandamus*.”

NOTE TO
THE
BANKERS'
CASE.

Petition of
Right—
lies for
breach of
contract :
Thomas v.
The Queen.

(l) L. R. 10 Q. B. 31; 44 L. J. Q. B. 9. Ad. & E. 999.

(m) And see *Wroth's Case*, Plowd. Com. 452.

(n) *R. v. The Lords Commissioners of the Treasury*, 4 Ad. & E. 286, 976, 984. See *Ex parte Ricketts*, 4

(o) *Reg. v. Commissioners of Inland Revenue*, 12 Q. B. D. 461; 53 L. J. Q. B. 229.

(p) *R. v. Bank of England*, 2 Dougl. 524.

NOTE TO
THE
BANKERS'
CASE.

Property
sufficiently
secured
from in-
vasion by
the Crown.

that justice may be done." The remedy by *mandamus* would of course be inapplicable as against the Crown (q).

As for the most petty and inconsiderable trespass committed by his fellow-subject, so for the invasion of property by his sovereign does our law give to a suppliant, full, free, and efficient redress. One exception, and one only, to this rule (as just intimated) occurs; and that is, where the sovereign has himself personally done an act which injures or prejudices another, for the King of England can theoretically do no wrong. Our law thus recognises his supremacy—it has omitted to frame any mode of redress for that which it deems to be impossible. And yet the law, whilst holding the sovereign personally irresponsible for his acts, will virtually limit this irresponsibility by visiting strictly upon the ministers or agents of the Crown the consequences flowing from obedience to its commands. The rule *respondeat superior* being here inapplicable, a remedy may be had against the agent, and so the suitor shall not retire from the king's courts without having justice done him (r).

(q) *Reg. v. Powell*, 1 Q. B. 352;
Reg. v. Commissioners of Customs, 5
Ad. & E. 380.

(r) *Non recedant quærentes a curiâ
regis sine remedio*, 2 Inst. 405.

§ 3. LEGISLATIVE POWER OF THE CROWN.

The enjoyment of personal liberty and private property without interference by the Crown is guaranteed by this fundamental doctrine of our constitution, that the sovereign cannot alter the existing laws—can neither add to nor dispense with them. “Can any man give me a reason, why the king can only in parliament make laws? No man ever read any law whereby it was so ordained, and yet no man ever read that any king practised the contrary. Therefore it is the original right of the kingdom, and the very natural constitution of our state and policy” (s).

Of the two propositions above stated, the former is in the following pages exemplified by *The Case of Impositions* and *The Case of Ship Money*; the latter by *The Case of the Seven Bishops*.

BATES'S CASE (THE CASE OF IMPOSITIONS), 2 St. Tr. 371 (t).

(4 Jac. 1, A.D. 1606.)

RIGHT OF THE CROWN TO IMPOSE TAXES ON IMPORTS.

The sovereign cannot without the assent of parliament impose a duty on currants imported into this country.

An information was exhibited in the Court of Exchequer against Bates, a merchant of the Levant; which—reciting that the king by his letters patent under the great seal had commanded his treasurer, that he should command the customers (u) and receivers to ask and receive of every merchant denizen bringing into any port

(s) *Per* Yelverton, *arg.*, 2 St. Tr. 483.

(t) S. C. Lane, 22.

(u) Customers, *i.e.*, collectors of customs. Todd, Johns. Dict. *ad verb.*

BATES'S
CASE.

within his dominions any currants, 5*s.* a hundred for impost, above 2*s.* 6*d.*, which was the poundage by the statute (*x*) of every hundred,—alleged that Bates had notice thereof, and that he had brought currants into the port of London, and refused to pay the said 5*s.* in contempt of the king.

Whereunto Bates came, and said, that he is an English merchant adventurer and denizen, and that he made a voyage to Venice, and there bought currants, and imported them into England; and he recited the statute granting 2*s.* 6*d.* for poundage, and said, that he had paid that, and therefore had refused to pay the 5*s.* because it was imposed unjustly, against the law of the land. Whereupon the king's Attorney demurred in law.

Judgment.

Upon which demurrer judgment was given for the Crown (*y*), for these reasons:—

I. The precedents of every court ought to be a direction to that court to judge of matters which are aptly determinable therein, as in the King's Bench matters of the Crown, in the Common Pleas matters of inheritance and civil contracts, and in the Exchequer matters of the king's prerogative, his revenue and government. But in cases touching the prerogative, the judgment shall not be according to the rules of the common law, but according to the precedents of this court wherein such matters are disputable and determinable (*z*).

II. The king's power is twofold, ordinary and absolute. His ordinary power is for the profit of particular subjects, for the execution of civil justice, the determining of *meum*; it is exercised by equity and justice in ordinary courts, and by civilians is nominated *jus privatum*, with us, common law: it cannot be changed without parliament. The absolute power of the king is applied for the

(*x*) 2 Jac. 1, c. 33.

(*y*) Sir Thomas Fleming was Chief Baron of the Exchequer when this judgment was given. See Foss,

Judges of Eng., vol. vi. p. 155.

(*z*) See *The Case of Mines*, Plowd. 320.

general benefit of the people, and is *salus populi*, as the people is the body, and the king the head; this power is properly termed policy or government, and as the constitution of the body varies with time, so varies this absolute law, according to the wisdom of the king, for the common good. The matter in question is material matter of state, and ought to be ruled by the rules of policy; and if so, the king has done well to execute his extraordinary power. All customs, old or new, are effects of commerce with foreign nations; but commerce and affairs with foreigners, war and peace, the admitting of foreign coin, all treaties whatsoever, are made by the absolute power of the king; and he who has power over the cause has power also over the effect. No exportation or importation can be, but at the king's ports. They are the gates of the king, and he has absolute power by them to include or exclude whom he pleases; the ports are harbours for the merchants, and for their better security, the king is compelled to provide fortresses, and to maintain, for the collection of his customs and duties, collectors and customers; and for such charge it is reasonable that he should have some benefit. He is to defend the merchants from pirates. Also, they are to be relieved, if oppressed by foreign princes, by treaty and embassy; and if the merchants be not remedied thereby, then *lex talionis* is to be executed, goods for goods, and tax for tax; and if this will not redress the matter, then war is to be declared (a).

BATES
CASE
Judgment.

III. The king may restrain the person *à fortiori* he may restrain the goods (b). The writ of *ne exeat regno* prohibits him to whom it is directed from going beyond seas, and may be sent at the king's pleasure to any

(a) This branch of the argument in favour of the king's right to impose is exhibited at greater length in Sir John Davis's Dissertation on Impositions of the Crown, 2. St. Tr. 399 *et seq.*

(b) See the authorities cited Bac. Abr. Prerog. (C.) 3.

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CASE.
—
Judgment.

subject; and as he may prohibit the person, so may he the goods of any man,—so that he shall not export or import at his pleasure. And if the king may generally prohibit goods from being imported, by the same reason may he prohibit them *sub modo*, viz., that if merchants import such goods they shall pay, &c. And if a subject trade after such prohibition, or import his wares, and pay not the impost, it is a contempt, and the king may punish him for it.

It is said, that an imposition may not be upon a subject without consent of parliament; but the impost here is not upon a subject, it is upon Bates as a merchant, who imports goods charged by the king; which, moreover, at the time of the impost, were the goods of the Venetians, not of a subject, nor were they within land.

Further, it is reasonable that the king should have as much power over foreigners and their goods, as over his own subjects; and if the king cannot impose upon foreign commodities a custom, as well as foreigners may upon their own commodities, and upon the commodities of this land when they come to them, then foreign states may be enriched, and the king impoverished, not having equal profit with them.

IV. It is truly said, that if the king may impose, he may impose what he pleases; but this is to be referred to the wisdom of the king, and not to be disputed by a subject. The ordering of many things is left to the king's wisdom. The king may pardon any felon; yet it may be objected that if he pardon one felon he may pardon all, to the damage of the commonwealth (c). As the king may grant a protection for one year, so he may grant it for many years, which might be mischievous. So the king may grant a safe conduct to a stranger; and if he may do that, he may grant it to all, which would be burthensome to the inhabitants.

(c) *Ante*, p. 169.

V. A brief answer may be given to the statutes alleged on the part of the defendant by this exposition, that subjects and merchants are to be freed of "maletolt:" and this was toll unjustly exacted by London, Southampton, and other ports within the realm; but with this saving; that they are to pay the duties and customs, due, or which hereafter shall be due, to the king (*d*).

BATES'S
CASE.
—
Judgment.

So judgment was given in the Exchequer for the Crown.

Some years after the judgment in *Bates's Case* had been pronounced (A.D 1610), the right of the Crown generally to lay impositions on the subject was debated in the House of Commons, and amongst other branches of this asserted prerogative, the king's right to lay imposts on goods imported was discussed (*e*). On this occasion Mr. Hakewill contended that the judgment of the Court of Exchequer in favour of the Crown was against the Great Charter, and therefore void (*f*). He inquired:—

Proceedings
in Parlia-
ment.

Mr. Hake-
will's
Argument
in the
House of
Commons.

1st. Whether custom be due to the king by the common law?

2ndly. Admitting it to be due by the common law, whether it were a sum certain not to be increased at the king's pleasure?

3rdly. Supposing that by the common law the king might by way of imposition have increased his custom at his own will, by his absolute power, without assent in parliament, whether he were not bound to the contrary by Acts of Parliament?

Lastly, Mr. Hakewill showed the weakness of the reasons offered in maintenance of the king's right to impose.

I. That custom is due by the common law appears:—

(*d*) With a view to avoiding repetition, the above judgment has been presented in an abridged form.

797; Parl. Hist., vol i. p. 1132.

(*f*) By 25 Edw. 1, c. 2; *et vide* 42 Edw. 3, c. 1.

(*e*) Carte, Hist. Eng., vol. iii. p.

BATES'S
CASE.

Mr. Hake-
will's
Argument.
Custom is
due to the
king at
common
law.

1. By the name thereof, for though now it be (and so has been for more than 350 years) called in law Latin *custuma*, yet in ancient time it had no other name amongst us than *consuetudo* (*g*)—a word which also occurs in ancient records. That the term *consuetudo* (which implies an approved continuance without a known beginning (*h*), should by the common law be given to this more than any other revenue belonging to the king; that the term should be applied to this duty rather than to any other amongst all the ancient usages and customs which the common law embraces, cannot but denote its great antiquity, and the allowance and approval thereof by the common law: for if, beside the antiquity of this duty, the common law had not also allowed its reasonableness, and in a manner its necessity, it would never have had this name of excellence above all other customs. Therefore doubtless the duty thus favoured is a child of the common law.

Further, it is of the very essence of a custom to have its beginning by allowance of the common law, for that which began by private contract or by Act of Parliament cannot be a custom. Moreover, considering that this custom is not limited to any one place within the realm, we may pronounce it to be part of the common law itself. Magna Carta (*i*) terms this not merely *consuetudo*, which implies antiquity beyond all remembrance of a beginning, but *antiqua consuetudo*. And, in comparison with this old custom due at common law, the custom upon staple commodities given or increased by stat. 3 Edw. I., was called *nova consuetudo*. Before the making of which statute custom was, however, due; for by 51 Hen. 3, st. 5, the collectors of the custom of wools were to yield their accounts twice every year into the exchequer.

(*g*) Vide Magna Carta, cap. 30.

et a quo inducta. Ducange, Gloss.

(*h*) *Consuetudo*, i.e., *præstatio*,
pensitatio, *cujus initium ignoratur*

ad verb.

(*i*) Cap. 30.

2. In all cases where the common law puts the king to sustain a charge for the protection of the subject, it yields him out of the thing protected some gain towards the maintenance of the charge—as for the protection of wards, lunatics, and idiots, the profits of their lands; for maintenance of courts of justice, fines and other like profits. So, because the common law expects that the king will protect merchants by maintaining and fortifying the havens at home; by clearing the sea of pirates and enemies; and by maintaining ambassadors abroad to treat with foreign princes,—it gives him out of merchandise, exported and imported, some profit for the sustentation of such public charge.

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CASE.
—
Mr. Hake-
will's
Argument.

II. This duty, given by the common law to the king, was and is a duty certain, not to be enhanced by the king at his own pleasure without assent of parliament. The common law of England delights in certainty: *Quod certum est retinendum, quod incertum est dimittendum, nay quod incertum est nihil est (k)*. If then the law so judge of the acts of men, holding for naught such as are uncertain, how much more does the law require certainty in her own acts which are to bind all men? And if in any act of the law certainty be specially required, most of all is it requisite that bounds of limitation be set between the king and his subject. And if in any case between the king and his subject more than another certainty be needed, most of all is it so in cases where our common law gives the king a perpetual revenue to be raised out of the property of his subjects.

Hence this proposition is maintainable, that the common law of England gives to the king as head of the commonwealth no perpetual revenue or profit out of the property of the subject, unless it either limits a certainty therein at first, or so provides that if uncertain it may be reducible to a certainty by some legal

All revenues given to the king at common law are certain or reducible to certainty by some legal course.

(k) *Incerta pro nullis habentur.* Dav. 33.

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CASE.

Mr. Hake-
will's
Argument.

Reasons
why the
common law
requires cer-
tainty in
revenues de-
rived to the
king from
the subject.

course, *i.e.*, by parliament, by the judges, or by a jury ; not by the king's own absolute will and power.

The law requires certainty in matter of profit between the king and the subject. (1.) Because to make any man judge in his own case, especially the strong over the weak, and that in a point of profit to him who judges, were to leave a way open to oppression. (2.) Because by reducing such profit to a certainty the king may know what to expect, and so may order his charge accordingly. (3.) That the subject likewise may know what he is to pay, and what will remain to him as his own. (4.) That the king may not depend upon the good will of the subject for his revenue, but may know what to claim as due, and so may compel the subject to pay it. (5.) That the subject may not be under the king's absolute power to pay what the king pleases, which might perhaps extend to the whole value of his merchandise.

The law, by requiring certainty in matter of profit between the king and the subject, prevents many mischiefs—whence we might conclude that custom was and is a sum certain. There are, however, other revenues due to the king at common law besides custom, and if they all, or as many of them as we can call to mind, are found to be sums certain—not liable to be increased at the king's pleasure—this will furnish a forcible argument that custom is likewise certain, the argument *a simili* being of great force in debate concerning things doubtful, in law—*quæ legibus decisa non sunt, judex ex his quæ decisa sunt statuet, et de similibus ad similia procedat*.

The common law gives the king a fine for the purchase of an original writ (*l*). Is it certain? It is, and ever has been; nor can the king increase such fine at his pleasure. There is a fine due at common law *pro licentiâ concordandi* (*m*), equal to the tenth part of the land comprised in the writ of covenant. And is not the post-

(*l*) 1 Sellon, Pract. Introd. xli.

(*m*) 2 Sellon, Pract. 469.

fine (n) thereupon due also certain? There are also other duties certain, belonging to the king by the common law: *ex. gr.*, the relief for an earldom is 100*l.*, for a barony 100 marks, for a knight's fee 100*s.*; all which in Magna Carta (o) are called old and ancient duties. There is likewise prisage, a duty given by the common law to the king, upon every ship-load of wine brought into the kingdom by English merchants; viz., one tun of wine before and another behind the mast. Custom then being, as the above revenues are, due to the king at common law, arising out of the property and interest of the subject, is, like them, limited to a certainty, which the king has not power to increase. *Ubi eadem ratio, eadem lex.*

BATES'S
CASE.Mr. Hake-
will's
Argument.

It may perhaps here be objected, that the aid paid to the king upon the knighting of his eldest son, or marriage of his eldest daughter, was by the common law uncertain; and that the king took more or less at his pleasure, until he was bound to the contrary by statute. To this divers answers may be given. Though the aid in question were indeed a sum uncertain, yet the common law did in some sort limit it; for it is called reasonable aid: so, if the sum demanded exceeded what was reasonable, it became an unjust exaction. Besides, this revenue was rare, and therefore the certainty thereof was not much regarded by the law. And yet it is observable that the frame of the commonwealth could not long endure uncertainty even in this casual revenue; for it was reduced to a certainty of 20*s.* upon a knight's fee, and 20*s.* upon every 20*l.* socage land, by stat. Westminster I., c. 36. If in this casual revenue our ancestors were so careful to arrive at a certainty, to avoid unreasonable aid, as the words of the statute are, how much more careful would they have been to have reduced the great and annual revenue of the custom to a certainty, if they had not thought it to have

(n) *Id. ibid.*

(o) Cap. 2.

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CASE.

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will's
Argument.

been certain by the common law, or limited by statute? But, further, reasonable aid was and is by the common law due as well to mesne lords as to the king; and mesne lords were not limited to a certainty, otherwise than that the aid must be reasonable. Therefore there was no reason to limit the king any further; and this answer may be given to all uncertain revenues belonging to the king, the like of which mesne lords have of their tenants; for the uncertainty of which there may also be given a special reason; that these duties first began by special contract between lord and tenant, nor directly by operation of the common law, and so were certain or uncertain as at first agreed. Hence the proposition, already stated—that revenues due to the king as head of the commonwealth (by which are purposely excluded such revenues as are common to him with other mesne lords) are always certain.

Again, where the common law gives the king a revenue not certain at first, it is always reducible to a certainty by some legal course, as by Act of Parliament, judge or jury, and not at the king's pleasure. Every man, who by tenure is bound to serve the king in his wars, and fails, is to pay, according to his tenure, a fine named escuage. This cannot be assessed but in parliament. Upon forfeiture for treason, or otherwise, though there be a kind of certainty, in giving to the king all the estate of the convict, yet for reducing it to a more express certainty, the law requires that it be found by office. Waifs, wreck, treasure-trove, and such like, are no less certain; for the king has the things themselves in kind. Fines for misdemeanors are always assessed by the judges. Amercements in all cases are to be assessed (*p*) by the country, not assessed by the king; though the form of

(*p*) *i.e.*, set. Afferors were persons appointed in Courts Leet to set fines on such as had committed faults for

which no express penalties were specified by statute. Cowell, *Law Dict. ad verb.*

the judgment be, *et sit in misericordiâ domini regis pro contemptu prædicto*. Nay, though it be by statute enacted, that an offender shall be fined at the king's pleasure, the law, even in this case, will not leave the assessing of the fine to the king, to be by him rated privately; but it must be legally done in Court by the judges, who in all other cases are to judge between the king and his people, where the property of the subject, or any charge upon him comes in question (*q*). Insomuch that if a statute were made, that the king might raise the customs at his pleasure, yet this could not be done by the king's absolute power, but would need to be effected by some legal course. Much less then will the common law permit, that it should depend upon the king's absolute pleasure, there being no such statute in the case.

BATES'S
CASE.

Mr. Hake-
will's
Argument.

Another reason why the common law requires certainty in revenues derived to the king from the subject is drawn from the policy and frame of the commonwealth, and the providence of the common law, which, as it requires at the subject's hands loyalty and obedience to his sovereign, so requires, at the hands of the sovereign, protection and defence of the subject against all wrongs and injuries whatsoever. This protection, the law considers, cannot be given without charge to the king; the common law, therefore, has not only given the king great prerogatives touching his patrimony, but for the sustentation of his necessary expenses in the protection of his subjects, has also given him, out of the property of the subject, an ample revenue—in respect of wardships (*r*), in respect of forfeitures, in respect of penal laws, fines and amercements, profits of courts, treasure-trove, prisage, butlerage, wreck, and many more. To what end has the common law thus provided for the maintenance of the king's charge, but that after these duties are paid, the subject

Additional
reasons why
the common
law requires
certainty in
revenues de-
rived to the
king from
the subject.

(*q*) Year Bk. 2 Ric. 3, fo. 11, pl.
22 *ad fin.*

(*r*) See 14 Edw. 3, st. 2, c. 1.

RATES'S
CASE.

Mr. Hake-
will's
Argument.

may hold and enjoy the rest of his estate to his own use, free from all other burthens whatsoever? To what end has the law given a part to the king, and left the rest to the subject, if that which is left be also at the king's will, to make profit thereof as he pleases; To give a small portion to him who may at his pleasure take more or all, were a vain act. But it may be objected, that as the revenues are ordinary, so are they by the law provided only for the sustaining of the king's ordinary charge; and that if the law have not limited some certain course, how upon sudden and extraordinary occasions the king's charge may be sustained, there has yet been no reason shown why the king may not upon such occasion take some extraordinary course for the raising of money, as by laying impositions upon merchandize, or by a tax within the realm, rather than the commonwealth, for want thereof, should be endangered.

May the
king lay
impositions
upon extra-
ordinary
occasions?

To admit that upon occasion of a sudden war, the king may not only lay impositions, but levy a tax within the realm, without assent of parliament, would be very dangerous, and might bring us into bondage. Who shall be judge between the king and his people of the occasion? Can it be tried by any legal course? It cannot. If then the king himself must be sole judge in the case, will it not follow, that the king may levy a tax at his own pleasure, seeing his pleasure cannot be bounded by law? But for a full answer to the objection,—the common law has, for defraying the king's charge upon occasion of a sudden war, over and above all ordinary revenues, made an excellent provision; war must needs be either offensive or defensive. Offensive war must either be upon some nation beyond seas, or against the Scots, Welch, or other borderers within the land. If it be an offensive war upon some nation beyond seas, it cannot be a sudden accident, for it is the king's own act; and he may, and it is fitting he should, take deliberation: and if it be a just and necessary war, he may easily obtain assistance from

his subjects, by grant of aid in parliament. If the war be offensive upon some of the king's neighbours within this land, it cannot be sudden or unexpected by the king, being his own act; we know how politically the kings of this realm have provided in reserving tenures, by which many of their subjects are bound to serve them in those wars in person, at their own charge. Only a defensive war, by invasion of foreign enemies, can be sudden, in which case the law has not left the king to war at his own expense, or to rely upon his ordinary revenue, but has notably provided, that every subject, whether he hold of the king or not, may be compelled at his own charge to serve the king in person. The reason of which was, that the king might have no pretence for the raising of money from his subjects at his own pleasure, without their assent in parliament. Seeing, therefore, that the common law, for maintenance of the king's ordinary charge, has given him such an ample revenue out of the property of the subject, and provided also for sudden occasions; it has in so doing secured the rest of the subject's estate from the king's power; and consequently the king cannot upon any occasion charge the estate of his subject by impositions, taxes, or any other burthen whatsoever, without the subject's free assent in parliament.

The two arguments urged, that of certainty, and this of the provision made by the common law, go directly to prove that the king cannot impose. The following are arguments of inference or presumption; drawn from the actions or forbearances of the kings or people of this realm.

First, all the kings of this realm since Henry III. have sought and obtained an increase of custom, more or less, by the name of subsidy, the gift of their subjects in parliament. Even King Edward III., being about to undertake a just and honourable war, than which there could not happen a better occasion for making use of his prerogative of imposing, nevertheless at that time in full

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Arguments
drawn from
the actions
of our kings
that they
had no
power to
impose.

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assembly of the three estates, prayed his subjects to grant him a relief for maintenance of the war, and that to endure but for a short time; and, further, was well content to suffer his prayer in that behalf to be entered of record to the memory of all posterity (s). It is not likely, that if any king had thought he had power by just prerogative to lay impositions at pleasure, he would not rather have done so than taken this course by Act of Parliament, so full of delay, so prejudicial to his right, so subject to the pleasure of his people, who never undergo burthens but with murmuring and unwillingness?

If our kings themselves were ignorant of this great prerogative, which cannot be imagined, had they not always about them wise counsellors to assist them, and such as for procuring favour to themselves would not have failed to have put them in mind of it? Nay, if these counsellors had known of any such lawful prerogative, had they not been bound in conscience so to have done? What an oversight was it of King Edward III., and all his council, so much to prejudice his right as to suffer him upon record, and that in parliament, to pray for that which he might have taken of his absolute power! Could there be a more direct disclaimer of the right? To compare great things with less, if the lord by matter of record claim anything of his villein, it is a disclaimer of the villenage.

The kings of England have other noble and high prerogatives,—*ex. gr.*, the making of war and peace, the raising and abasing of coin at their pleasure. Did they ever crave the assent of their subjects in parliament to make war? Their advice, indeed, they have sometimes sought, and their aid for treasure to maintain it. The prerogative of raising and abasing the value of money has been often put in practice by them, and sometimes strained to such a height, that the king might well

(s) 14 Edw. 3, st. 2, c. 1 and c. 4; st. 1, cc. 20 & 21.

suppose his subjects could not but be much discontented therewith. And yet never any king of this realm did it by assent of parliament, which perhaps some one king among so many would have done, if the seeking of assent in parliament had not been thought to have been prejudicial to the absolute power of his successors.

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Some of the kings of England, for instance Edward II. and Edward III., were contented to accept an increase of custom by way of loan from the merchants, and solemnly bind themselves to repay it. Would any wise man who thought he had but a colour of right, so much prejudice himself as to borrow that which he might take without leave, and bind himself to repay it? Reference need scarce be made to the actions of Edward II., who was a weak prince; but as for his son and successor, Edward III., there was not a stouter, a wiser, a more noble and courageous prince than he, and none more careful to preserve the rights of his prerogative, as may appear by his answers in parliament on complaint of the subject. Besides, never had king of this realm more occasion than he to strain the prerogative of imposing to the utmost. For besides excessive expense in the wars with France and Scotland, he had a charge of many expensive children. Insomuch, that through these occasions of extraordinary expense, and the diminution of his revenue, he was driven to such necessity, that his queen was forced to pawn her crown and jewels to procure money for him. Nay, the king himself, in these extremities, was oftentimes driven to pawn his jewels, and in the seventeenth year of his reign he pledged his crown for 4000*l.* to certain merchants of Florence. We see therefore that this powerful king wanted not urgent and just occasion, if any occasion may be just, to put in practice his absolute power of imposing; and yet it appears of record, that in the midst of his great wants he took an increase of custom "by way of loan," and bound himself to repay it.

Yet is not this all; for some of our kings, as Edward I.,

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not only took it by assent in Parliament, or by way of loan, but (as one that buys for money in the market) gave for it a valuable consideration, and that to merchant strangers, of whom there was more colour to demand it as a duty, than of his natural subjects. Thus by *Carta Mercatoria* (*t*) it is recited, that, in lieu of certain liberties and immunities granted by the king to the merchant strangers, as also for the release of prisage, they granted to the king an increase of custom.

And it is worthy of observation, how the same king in the same year of his reign commanded his customers throughout England, that, whereas certain English merchants were, as he was informed, of their own accord willing to pay him the like increase of custom as the merchant strangers had granted unto him, provided they might enjoy the like liberties and benefits; nevertheless they should not compel such English merchants, against their wills, to pay it. What stronger inference can there be against the king's absolute power of imposing, than this?

Another observation drawn from the actions of our kings, touching the increase of their custom, is this, that those kings who laid impositions (which was very rarely), though it were never but in time of great necessity, and but to endure for a short time, always did it, not with the advice only of the merchants, but as a solemn grant by them: and our kings were always wary, for the better justification of their actions to the people, in their commission for collecting custom, to recite not only the great necessity which moved them to take an increase of custom, but also the grant of the merchants, as may appear by records, of which we have the copies amongst us. There are not above one or two that are otherwise, and yet these impositions also, by the grant of merchants,

(*t*) 31 Edw. 1. See Anderson, *Hist. Comm.*, vol. i. p. 268; Sinclair on the Revenue, p. 68.

though raised upon never so great a necessity of state, and to endure but for a short time, were always complained of by the commons when they met in parliament, as may appear amongst other records by the Parliament Roll.

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For instance, in a petition of the Commons (u), exhibited to the king in parliament, are these words: "The Commons show, how the merchants have granted by themselves, without assent of parliament, a subsidy of 40s. upon a sack of wool, over and above the rightful custom of half a mark; and pray that it may be redressed at this parliament; for it is against reason that the commonalty should be charged in their goods by merchants." With this agrees the stat. 36 Edw. 3, c. 11, where we find an express provision against the raising of impositions upon wool, by grant of merchants; wherein we observe that parliament in those days distinguished, as we now do, between impositions laid by statute and impositions laid only by the grant of merchants, acknowledging the former only are lawful, and condemning all others as unlawful.

Hitherto arguments have been drawn from what our kings have done, and put in practice, for the increase of their custom. Some observations shall now be made respecting their forbearance to put this pretended power in practice, regard being had to the several occasions of the times.

Arguments
drawn from
the forbear-
ance of our
kings to lay
impositions.

First, then, in general, we observe that from the Conquest until the reign of Queen Mary, being no less than 480 years, our kings have, in the practice of the pretended prerogative of imposing, been so sparing, that notwithstanding search made it cannot be found or proved by matter of record, that six impositions, such as we now complain of, were laid by those kings, who were in number twenty-two. And those six, if there were so

(u) 27 Edw. 3.

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many, though unlawful, were in some sort to be borne,—
(1) Because they were very moderate. (2) Because they were laid in times of great necessity, and were to endure but for a year or two; for none of them, except that upon wine, laid 16 Edw. I., lasted longer. And if the impositions now laid had been so qualified, we should, probably, never have complained of them. And yet not one of these few impositions, laid in former times, but was complained of, and upon complaint taken away. How much more reason is there that we should expect the like justice now; considering, that not one kind of merchandise, as then, but very nearly all sorts are charged; that not a moderate charge is laid upon them, but such, as though we should confess his Majesty's absolute power to lay what he list, yet we might justly complain of the excessiveness of the burthen? For (1) the rates of merchandise, for the subsidies of poundage and tonnage, are extremely raised, which, though lawful, has rarely been put in practice. Then comes the impost upon the back of that, and is as much as the subsidy itself. (2) These impositions were not laid in time of war, but when we were at peace with all the world. (3) These impositions are not, as those in former times were, limited to endure for a year or two, but are for his Majesty, his heirs and successors for ever. So that, if those few impositions laid in former times had been lawful, yet can they not warrant our present impositions, differing from them in these points of consequence. But if even those few, so qualified as they were, were complained of and taken away, what shall we say of ours, so far exceeding them in irregularity? Besides, if so few precedents, as five or six in so many years' space, and those in times of great necessity, without any express judgment in law or good authority in affirmance of them, but accompanied with as many complaints against them, be argument enough to prove the lawfulness of the act, as well taxes within the land, as impositions upon

merchandise, may be proved to be lawful. But to allege the acts of kings, in raising a profit to themselves upon their subjects, to prove thereby their right, is of all arguments the weakest.

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In saying it could not be proved by the records that from the Conquest to Queen Mary's time there had been more than six impositions laid, such impositions only were meant as we now complain of; for it must be confessed that during that period many more impositions were laid differing in nature from ours; so much that they cannot properly be called impositions. And yet this practice has been relied upon to prove the lawfulness of the impositions now complained of. The impositions now in question are no other than an increase of custom at the king's pleasure, commanded by him to be taken, the passage being free and open to all men. Those other imposts which are produced as precedents in maintenance of these, are dispensations or licences for money, to pass with merchandise prohibited by Act of Parliament to be exported.

Divers im-
positions
laid by for-
mer kings
distinguish-
ed from that
in question.

The first imposition, alleged as a precedent, is that of 16 Edw. I., which was four shillings upon a tun of wine. This indeed might have been a mere imposition, such as those now in question; for the words of the record are, *cum rex præcepisset, ut de singulis doliis vini caperentur quatuor solidi*. Yet it follows not that the impost was laid by the king's sole command; for even some Acts of Parliament, in those ancient times, though made by the full assent of all the three estates, have these words in their preambles, *rex præcepit, rex vult*. And in the recitals of Acts of Parliament by the king, in his commissions and otherwise, it was in those times usual to say, *cum nuper ordinaverimus*; and therefore, notwithstanding the recital be *cum nuper rex præcepisset*, it is no clear proof, that therefore it was done only by the king's commandment. Nevertheless, admitting this to be a mere imposition not limited to endure for a time

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certain, let us inquire with what circumstances this imposition was accompanied, and what followed of it; and then judge how far the present impositions may be justified by this.

The first circumstance to be observed concerning this imposition is, that it was laid immediately after the war against Wales was ended, and at that time when for the selling of the estate of Gascony, the king himself was in person forced to undertake a voyage thither, as may be collected from the very words of the record, *cum rex ante ultimum recessum suum ab Angliâ præcepisset*, &c. As these times were troublesome, they were also very chargeable to the king, and induced him to try all means for the levying of money. Another circumstance is, that this imposition, laid in a time of great necessity, was not, as now, upon all merchandise, nor so much as in general upon one kind of merchandise, coming from any part of the world, but only upon such wines as might be brought hither from two towns in Gascony, as may appear by the records; and it is probable that these towns were then in revolt, and that the sooner to reduce them to obedience, the king laid this burthen upon their produce, thereby to hinder its sale. Another circumstance is, that though this imposition was indeed laid without limitation of time, yet within six years, viz., in 22 Edw. I., upon complaint of the merchants the king released two shillings of the four; with which the merchants not holding themselves contented, in the very same year the whole imposition was released. And within three years after the release there followed an Act of Parliament (x) against all impositions.

The third precedent vouched was in 31 Edw. I., being the increase of custom which the merchant strangers

(x) 25 Edw. 1, c. 7. See also stat. 21 Edw. 1, c. 7, which was passed to take away an imposition upon wool laid in the same year, and

is the first statute made against impositions by the king without assent of parliament.

granted to King Edward I. by Carta Mercatoria. This has been urged as an imposition by the king's absolute power on the ground that, although apparently a grant by the merchants, efficacy was given to it by the king's pleasure to accept such grant. Admitting it however to have been a mere imposition, the king took it not without yielding some recompense for it, for the merchant strangers, by submitting themselves to this charge, obtained by the same charter divers liberties and immunities from the king—amongst which was freedom from prisage. In which respect this imposition is in some sort tolerable, though not at all lawful. But even this imposition was within a few years complained of in parliament, and, upon complaint, taken away (*y*). Since, however, the renewing of it rested at the king's pleasure, within two years after, by a public ordinance made by the principal prelates, earls, barons, and other great men of the kingdom, authorised by the king's commission, the charter itself was declared to be utterly void; as being hurtful to the commonwealth, against Magna Carta, and made without assent in parliament. And not only that charter, but all other new customs or impositions whatsoever, imposed since the coronation of Edward I., were also taken away, saving the old custom upon wool, wools, and leather. And further it was ordained, that if any man should presume to take any more than the ancient custom rightfully due, and should be thereof convict, he should answer to the party grieved his costs and damages, be imprisoned, and be further punished as an offender against Magna Carta, according to the discretion of the justices.

But it has been said, that notwithstanding this ordinance, the imposition nevertheless continues in force, and therefore in likelihood the ordinance prevailed not against it. 'Tis true, that at this day the merchant

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stranger pays threepence more in the pound for subsidy than the English merchant does, and that by virtue of Carta Mercatoria. But Carta Mercatoria in itself had not strength sufficient to subsist for so long a time. It was, as stated, suspended by the king himself, condemned by the ordinance of 5 Edw. II., and had at this day been of no force had it not been confirmed by Act of Parliament (z).

Thus have been examined three of the six precedents most relied upon for maintenance of the present imposition, which are all that can be found to have been practised from the Conquest till the reign of Edward III., during which time there are as many public Acts in opposition to them, of so much the more force, in that they are the legal regular acts of great councils; whereas, those three impositions were the acts of powerful kings, in times of extreme necessity.

The urgent
occasions
for laying
impositions
temp. Edw.
2, consider-
ed, and how
he forebore
to lay them.

As for Edward II., there has not been one imposition alleged to have been laid by him. Nay, all the records touching this matter found in his time, being only four, make directly against them.—The first is a release at the king's will, upon complaint of the Commons, of the impositions raised by Carta Mercatoria (a).—The second is the ordinance, declaring Carta Mercatoria to be void, as well as all other impositions, and inflicting punishment upon such as should demand any.—The third is a supersedeas to discharge certain commodities from yielding an increase of custom granted by merchants by way of loan, which in great probability the king would never have released, but upon complaint; the rather, because it was granted in a time of great necessity.—The fourth is much of the same nature; its recital shows thus in very effectual words the greatness of the king's wants, and the causes thereof. *Cum pro expeditione guerræ nostræ Scotiæ, et aliis arduis necessitatibus nobis multipliciter*

(z) 36 Edw. 3, c. 11.

(a) *Ante*, p. 264.

incumbentibus, pro quarum exoneratione quasi infinitam pecuniam profundere oportebit, pecuniâ plurimum indigeamus in presenti; ac insuper, pro eo quod exitus regni et terræ nostræ, simul cum pecuniâ nobis in subventionem præmissorum tam per clerum quàm per communitatem regni nostri concessâ, ad sumptus predictos cum festinatione quâ expediret faciendos non sufficiunt. Here was cause, if any cause were just, for the king to put in practice his prerogative of imposing. Does he for all this make use of his prerogative of imposing? No. After much deliberation, the course resolved upon was, not by absolute power to lay impositions, which of all courses, if lawful, had been the most speedy and beneficial; but that merchants should be called together, and should be entreated to lend the king upon every sack of wool 10s., and upon every last of leather 5s. above the ancient custom; and that for their security of payment, without fiction or delay, which are the words of the record (whereby it seems that only a pretence of a loan and repayment had been before that time used to colour impositions), command should be given to the customers to certify into the Exchequer the name of every merchant who should so lend to the king, that he might receive full satisfaction. And 'tis worth observing, that this loan was for no longer time than from April till October following. So we see that in the reign of King Edward II. impositions were not only altogether forborne, even in the times of his greatest necessity, but were condemned as unjust and unlawful.

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In the reign of Edward III., five or six methods, all of them very colourable, were put in practice for raising impositions; yet each of them was resisted by parliament and condemned.—That most usual was that merchants should agree to pay the king so much upon every commodity exported or imported by way of increase of custom. This seems not unreasonable, and was never attempted but in time of war; yet it was always held unlawful, as

The policy
of Edw. 3,
with a view
to imposing;

—under
colour of a
grant from
merchants;

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may appear by the record of 17 Edw. III. (*b*), where the Commons in Parliament say, that it is a great mischief, and against reason, that they should be forced to pay dearer for commodities, by reason of a charge upon merchandise by the grant of merchants, which is a charge on the people. By the record of 25 Edw. III. (*c*), the Commons reciting, that merchants had granted a new increase of custom to the king, pray that commissions to collect such new increase of custom be not awarded. By stat. 36 Edw. 3, c. 11, grants of subsidies upon wool by merchants without assent of parliament are declared to be void, which Act was made upon petition of the Commons, 36 Edw. III. (*d*). If impositions raised by the grant of merchants, *i.e.*, by some public and solemn instrument, under the hands and seals of the principal merchants of the great towns of England, called together for that purpose, were not of force in this behalf, much less was their bare assent without any such solemnity, which was a course practised in the days of Edward III., and in laying the impositions now complained of.

- by dispen-
sation with
penal laws ;

Another means of raising impositions used by Edward III. was, by way of dispensation for money with some statute which restrained the passage of merchants. Most of his impositions, of one kind or other, laid after 11 Edw. III. were of this nature. For stat. 11 Edw. 3, c. 1, enacted that no man, upon pain of death and forfeiture of lands and goods, should export wool. Immediately after the making of this statute, impositions by way of dispensing with it for money came to be so frequent and burthensome, that the very year following, the king, being in person to undertake a war in Scotland, and having laid heavy impositions of this kind, which he perceived to be burthensome to the people, wrote to the

(*b*) Rot. Parl., No. 28, vol. ii. p. 229.
140. (*d*) Rot. Parl., No. 26, vol. ii. p.
(*c*) Rot. Parl., No. 22, vol. ii. p. 271.

Archbishop of Canterbury to this effect: "That whereas the people were much burthened with divers charges, tallages and impositions, which he could not mention but with much grief, yet being enforced by inevitable necessity could not as yet ease the people of them, he required the archbishop to exhort the people patiently and humbly to bear the burthen for a while, and to excuse him towards the people, hoping he should ere long recompense his said people, and give them comfort in due time." His necessities were nevertheless so great, and this method of raising money was so colourable, seeing no man was compelled to pay who did not himself desire dispensation, that the king spared not to lay on load in this kind, insomuch that in the thirteenth year of his reign he took for dispensations to pass to Antwerp of Englishmen 40s. upon a sack of wool, 40s. upon 300 woolfels, &c. Whereas the ancient custom was no more than 6s. upon a sack of wool, the like upon 300 woolfels, &c. Immediately hereupon, in the very same year, was this complained of in parliament, and a petition exhibited by the Lords and Commons (*e*) that it might be enacted that this imposition, because it was without assent of parliament, might be taken away, and that a law might be made, that no such charge should be laid without assent of parliament. And they further prayed, that they might have a charter under the great seal, to this effect, which was performed the next parliament (*f*). But such were the king's wants, that even between the petition and the making of the Act, he could not forbear to raise money by this means; for in 14 Edw. III., he took by way of dispensation 40s. upon a sack of wool, when safely landed at Brussels, and 40s. at the port within England, which was indeed an intolerable charge. But the better to colour it, the king, in his commissions for collection thereof, pretended that the merchants had been humble

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(*e*) Rot. Parl., No. 5, vol. ii. p. 104. (*f*) See stat. 14 Edw. 3, st. 1, c. 21.

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suitors to him, that the passage for wool might be open till Whitsuntide following; and that to obtain the same, they had of their free will offered to give him the said sums.

In further prevention of this mischief there was enacted a special provision against all licences to export (*g*). Nevertheless, as may be collected from a record of the same year, the king raised 40*s.* upon a sack of wool, &c., by way of dispensation. For though recited to be granted by merchants, yet was it no otherwise granted by them than for licences to export; for at that time the staple of wool was in England, as appears by 27 Edw. III., st. 2, c. 1 and c. 2.

This kind of imposition, by way of dispensation, was not at all practised from the 27th till the 39th year of Edward III., when, under pretence of a grant by merchants, or recital of suit made by merchants to have the passage open, as in former times, the king recites, "That whereas English merchants were by Act of Parliament restrained to transport wools, nevertheless, upon advice with his council he thought fit to give leave that such as would might transport wools paying 46*s.* 3*d.* upon a sack, which the king commandeth to be levied." This imposition lasted a very little while; for in the next parliament following was granted to the king a subsidy upon wool, woolfels, and leather, to endure for a very short time. And yet, as appears by the record, the king doth thank his people for it, with all his heart. At which time, for the maintenance of his wars in Scotland, he obtained the continuance thereof for two years, and afterwards for three years, for the supply of treasure for the war (*h*). Two years following, the Commons doubting, as it seems, that the king had secretly concluded to increase, by way of imposition, this subsidy, made a conditional petition, that if any imposition should be laid upon wool, woolfels,

(*g*) 27 Edw. 3, st. 2, c. 7.

and 10, vol ii, p. 300.

(*h*) Rot. Parl. 43 Edw. 3, Nos. 9

or leather more than the subsidy granted in parliament, it might be taken away. The king answered that, if any had been laid since the statute, it should be taken away (*i*); and then follows the statute, 45 Edw. III., c. 4, "That no impositions be laid upon wools, woolfels, or leather, other than the custom and subsidy granted to the king, without the assent of parliament."

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Other subsidies were granted to King Edward III. by his parliament (*k*), and in 48 Edw. III. the king took, as by the grant of merchants, certain customs by way of dispensation; yet, as showing how hateful such impositions were in those days, in the 50 Edw. III. one Richard Lyons, farmer of the customs, among other things laid to his charge, was accused in parliament of setting or procuring to be set new impositions, without assent of parliament, and was adjudged to forfeit his goods and lands (*l*). And the Lord Latymer, Lord Chamberlain of England, was expressly accused, that he combined with the said Richard Lyons and others, who for their own profit had procured and counselled the king to grant licences for the transporting of wool beyond seas, other than to the staple at Calais, against divers ordinances to the contrary, and had put upon wool and woolfels new impositions (*m*). Here we see, that the device of dispensation for money had the name of imposition in those days, though indeed it be not in its nature a mere imposition, or at least not such an one as those are which we complain of; but such as it was, we see how from time to time it has been condemned. To allege, therefore, any imposition of this kind, to prove the lawfulness of ours, cannot but argue a weak cause.—For there is far more reason and colour for this than for ours; inasmuch as in

(*i*) Rot. Parl. 45 Edw. 3, No. 42, vol. ii. p. 308.

(*l*) Rot. Parl., Nos. 17, 18, 19, vol. ii. pp. 323, 324.

(*k*) See Rot. Parl. 46 Edw. 3, No. 10, vol. ii. p. 310, and 47 Edw. 3, No. 12, vol. ii. p. 317.

(*m*) Rot. Parl. 50 Edw. 3, Nos. 20 *et seq.*, vol. ii. p. 324.

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—by ordi-
nance;

this case no man was compelled to pay, who did it not to avoid a greater mischief; whereas in our case a charge is laid upon him for exercising his lawful trade, where neither statute law nor common law is to the contrary.

Another device for raising impositions without assent of the Commons in parliament, practised by Edward III., was by way of ordinance, which indeed is next in degree of strength to a statute. It is a constitution made by the king himself, and all the prelates, earls, and barons, sitting in parliament, and has the like solemnity of enrolment that a statute has, only it is enrolled in a roll by itself, which has the name of the roll of the ordinances. The essential difference between this and an Act of Parliament is, that this has not the assent of the Commons.

Some ordinances have had such estimation amongst us, that they have at this day the force of statutes; as the ordinance of Merton (*n*), which, though made by the king, prelates, earls, and barons, without assent of the Commons, yet has, by continuance of time got, not only the strength, but the name of a statute. And to add further strength to the authority of an ordinance, the assent also of merchants was usually joined therewith; moreover, it was never but in time of war.

The first imposition by way of ordinance was 7 Edw. III., where it is said that the king considering how merchants, who make great gain by trading, ought as well as others to assist him with treasure for his war, especially considering how at their entreaty he had placed the staple in England; therefore, at his parliament held at York, by the prelates, earls, and barons, it was ordained that the merchants should yield unto the king a subsidy upon merchandise. This subsidy or rather imposition thus solemnly ordained, and in times of so great necessity, was no sooner established than revoked, whereupon the

(*n*) 20 Hen. 3.

merchants of their own accord yielded and freely gave 10s. upon a sack of wool, &c., for a short time, by way of dispensation or licence, towards the maintenance of the war.

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—under
colour of a
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Another invention for raising impositions, practised by Edward III. and in former times, was by way of a pretended loan from merchants, of so much above the old custom upon merchandise exported or imported, which loan was never repaid to the merchant. That this was an old practice, may be collected by the precedent of 12 Edw. II., already cited (*o*), where the king promises that without fiction or delay he would repay the merchants; implying thereby, that sometimes fiction had been used; and doubtless that loan which was raised in 11 Edw. II., the very year before, was such a feigned loan as spoken of; for otherwise, without question, the king would not have released part of it, as he did. If the money be *bonâ fide* borrowed, and truly intended to be repaid, then doubtless the course is lawful; if otherwise, this kind also is as unlawful as any of the rest.

Edward III. did once or twice borrow in this manner, as may appear by records already cited to another purpose.

There was yet another device for raising impositions, begun by Edward I., condemned in the time of Edward II., but revived and much practised by Edward III., which was also by way of grant of merchants, and yet not altogether the same as that practised by Edward II., but much more colourable and tolerable. For whereas that was a grant, or rather a mere gift, without anything granted back again in lieu thereof, this is a solemn grant made by merchants of an increase of custom, for liberties, privileges, and exemptions, granted to them by the king. The former was *date nihil expectantes*. This is, *date et dabitur vobis*. Of this kind is the grant of merchant strangers, already mentioned under the name of Carta Mercatoria (*p*).

—by grant
of merchants
for liberties
conceded to
them

(*o*) *Ante*, p. 266.

(*p*) *Ante*, p. 260.

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—by express
command of
the king.

One other mode of levying impositions was practised by Edward III., not coloured or masked under any pretence of politic invention, but plain and direct—by his own express commandment to his officers, to collect of every merchant so much for such a commodity, exported or imported, and to answer it into his exchequer, without any recital in his commissions of grant, assent, gift, loan of merchants, dispensation, or ordinance in parliament, or any other such colourable pretext whatsoever.

These indeed, and only these, are mere impositions, and may be aptly compared with those of our times. Of this kind, amongst the records of Edward III.'s time, are only two.

1. It appears that Lionel, afterwards Duke of Clarence, the king's second son, being then guardian of England, whilst his father was at the siege of Calais, at a council by him held the same year, assessed without assent of parliament, upon every sack of wool two shillings (*q*). This imposition was, as our present impositions are, imposed only by the king's absolute power, yet in circumstances very material there is an apparent difference between them. 1st. This imposition was very moderate in amount. 2ndly. It was to continue no longer than till Michaelmas following. 3rdly. It was laid in time of war, and ordained to be employed for the maintenance of ships of war, for the safeguard of merchants in their passage, of which there was great necessity.

Besides, such as it was, and so qualified, it was nevertheless complained of in parliament, by a petition from the Commons, as may appear by the record. To which petition or complaint this answer was given, "That all the said impositions were already taken away, save only the two shillings upon a sack of wool, which should last no longer than Easter; and seeing the same was ordained for the safeguard of merchants, in which there had been

greater sums of money expended by the king than could be collected between that and Michaelmas, therefore to continue the same till Easter, he hoped, would not seem over-burthensome or grievous unto them." In the parliament following, the Commons prayed that writs might be directed to the customers to forbear at Easter next to take the two shillings upon a sack, according as it was granted at the first parliament, and that it be not any longer continued by the procurement of any merchant. The king answered, "Let it cease at Easter, as it was agreed the last parliament" (r).

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This imposition was, perhaps, only by way of dispensation: for to what end should the Commons pray that it might not be any longer continued by the procurement of any merchant, unless it were likely that merchants for their benefit should pray the longer continuance thereof; and of what benefit can any imposition be to a merchant unless it be by way of dispensation to give him leave to trade, where before such dispensation given he was restrained? If this were an imposition by way of dispensation, with a penal statute, then could it be no precedent for our present impositions.

2. The next precedent in the time of Edward III. for maintenance of impositions, was in the 24th year of his reign, whereby the king reciting, that whereas Spain and France had joined in league to make war against him, and that for withstanding his adversaries, as also for the safeguard of merchants against pirates, he had ordained that certain ships should be set forth, and that for maintenance of the said ships there should be paid by merchants two shillings for every sack of wool, &c., for one year following; commanded his customers to levy the same accordingly.

The very next year the Commons exhibited a petition in parliament against impositions and other like charges,

(r) Rot. Parl. 22 Edw. 3, No. 16, vol. ii. p. 202.

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without assent of parliament; to which answer was given, "That it is not the king's intention they should be charged" (s).

It appears, therefore, that the two impositions laid during the reign of Edward III. by the king's absolute authority, were qualified with such circumstances, as, if ours were such, we should have held them tolerable, though perhaps not lawful. Yet they escaped not without being complained of and condemned in parliament.

In what
statutes
impositions
are named
from the
time of
Edw. 3 to
that of
Queen Mary.

From the reign of Edward III. till that of Queen Mary, not one record has been found that proves an imposition to have been laid. There are indeed some three or four statutes during that time, in which mention is made of impositions; but they are impositions of another nature from those now complained of; or, if such as ours are, yet are mentioned with disgrace, and to the end that they might be taken away.

The first is 11 Ric. 2, c. 9:—"No imposition nor charge shall be put upon wool, leather, or woolfels, other than the custom and subsidy granted to the king this present parliament; and, if any be, the same shall be repealed and annulled, saving always unto the king his ancient right." If by this saving the pretended right of imposing be excepted, the saving would be contrary to the body of the Act; and therefore it must needs have some other interpretation, that it may stand with the rest of the Act, and not condemn the law-makers of so much want of discretion. Therefore doubtless this saving is no other than an exception of the ancient rightful customs, due upon staple commodities. And perhaps the statute was made, not so much to take away any imposition laid by King Richard II., as out of a provident and prudent care in the law-makers, founded on the practice of Edward III. in this kind.

The next statute in which impositions are mentioned,

(s) Rot. Parl. 25 Edw. 3, No. 12, vol. ii. p. 238.

is 23 Hen. 6, c. 18, by which it appears, that English merchants, being restrained from repairing to Gascony and Guienne to buy the wines of that country, were nevertheless suffered to repair thither, paying certain new impositions which were demanded of them. Upon complaint hereof, it was enacted, that all English merchants might freely pass into those parts, and buy wines there at their pleasure, without any new imposition or charge to be put upon them; for that "such impositions were to the damage of merchants, and to the hindrance of all the king's people: if any were demanded by the king's officers, the officers so demanding them should forfeit 20*l.* besides treble damages to the party grieved."

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That these impositions were by way of dispensation with a statute, which restrained the repair of English merchants into those parts, and not by the king's absolute power, thereupon to ground an imposition, is evident by the statutes *infra* (t). The reason of the restraint by Edward III., seems to have been, because Gascony and Guienne were then in his possession, and he was desirous that the merchants of those countries should have the sole profit of their own commodities; that they only should import them into England, and not the merchants of England. Whatsoever the cause of the restraint was, it is very clear the restraint was by statute, and that this imposition raised by way of dispensation was condemned.

The next mention of impositions is in 1 Ric. 3, c. 2. The words are, "the subjects and commonalty of this realm shall not from henceforth be charged by any such charge or imposition called a benevolence, nor by such like charge." By the words of this statute we perceive what impositions were intended (u).

(t) 27 Edw. 3, c. 6; 38 Edw. 3, also in stats. 7 Hen. 7, c. 7; 12 Hen. c. 10. & c. 11; 42 Edw. 3, c. 8; 43 7, c. 6; and 14 Hen. 8, c. 4: where it seems to be used as synonymous

(u) The word "impositions" occurs with "charges."

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Urgent
occasions
for laying
impositions
from the
time of
Edw. 3 to
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Queen Mary.

Richard II., the grandson of Edward III., had little less occasion than his predecessor for imposing. He had little treasure left him, and was no sooner on his throne but news was brought that the French had invaded the realm. The Scots also were ready to overrun the north of England. Being thus beset with war, does his council advise him to raise money by impositions, as his grandfather had done? They do not; but he takes the ordinary course, by calling a parliament, which for maintenance of the war, the second year of his reign, granted him a fifteenth. He called another parliament, and had another fifteenth granted, in the fourth year of his reign. The wars increasing, his necessities were such, that parliament granted him a most unusual tax throughout the whole kingdom, upon every ecclesiastic, 6s. 8d., upon every other man or woman within the realm, 4d., which, when it came to be levied, caused the notorious rebellion of Wat Tyler.—From the 5th to the 18th year of this king's reign, he obtained every other year aid in parliament, sometimes a tax, sometimes a fifteenth, sometimes a subsidy of tonnage and poundage. In the 18th year he was forced to go in person into Ireland, to settle the state of that country, then in rebellion. All these troubles he had from abroad, besides rebellions at home, which afterwards cost him his crown, yet did he never for all this attempt to lay impositions.

King Henry IV., holding the crown by so weak a title, had cause to give the people all the content he could, yet was he so oppressed with war on all sides, that without the aid of his people it had not been possible for him to have held the crown. Therefore, in a parliament held the 5th year of his reign, was yielded to him so great and unaccustomed a tax, that its grantors took special care that no memory thereof should remain of record; and yet, the next year, his wants were grown so great, that his subjects, being assembled in parliament to give him further aid, resolved that there was no other way to

supply his wants, than to take from the clergy their temporal lands and goods, and to give them to the king; which being withstood by the clergy, a resumption of all the gifts of Edward III. and Richard II. was propounded. At last, after they had sat a whole year, they gave him two fifteenths. At this time, most of the great officers of the kingdom were spiritual men. Had they not now, if ever, a just occasion given them to have put the king in mind of his prerogative of laying impositions? Certainly they were not ignorant of such practice in former times. But in all likelihood as they knew that Edward III. laid impositions, so likewise they knew, that impositions had been from time to time condemned as unlawful; and for that reason did they forbear to advise the king to take that course.—Another prerogative, which as much concerned the interest of the subject as this of imposing, viz., the abasing of coin, this king made no scruple at all to put in practice, because he held it to be lawful.

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His son and successor, Henry V., who was beloved by his people, though the kingdom was now, by one degree of descent, more firmly settled upon him than it was on his father, who usurped it; though also his expenses, by reason of his war in France, were as great as any king's of England ever were; though he had troubles also from the Scots, and within his own realm by rebellions; and lastly, though he scrupled not, for supplying his treasury, to suppress above one hundred priories of aliens, never so much as attempted the laying of impositions.

His successor, Henry VI., though of a meek spirit, was yet so troubled within the realm, and from abroad, that he was forced to crave such an extraordinary aid of his subjects in parliament, that the levying thereof was the cause of the rebellion of Jack Cade. Besides, in the 18th year of his reign, for supply of his wants, all grants by him made, of any lands, rents, &c., were resumed: and this is never yielded to, but in cases of extreme

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necessity. As for impositions, notwithstanding his great wants, he thought not of them.

Edward IV., who succeeded him, was not more free from troubles; for he was driven to forsake his kingdom, and to live for a while like a banished man with the Duke of Burgundy. He also was forced in the 5th year of his reign to make a resumption; and the same year to abase his coin. And Comines observes of him, that he obtained a subsidy of his subjects in parliament, upon condition that he should himself in person undertake the war in France; and that, only to get the subsidy, he passed the seas into France, but presently returned without doing anything (*x*). Why should such shifts as these have been needed, if he might, without being beholden to his subjects, have lawfully and without control, raised treasure by laying impositions? It is well worth remembering, what Comines (*y*), speaking in commendation of the frame of this commonwealth, says, "That this state is happy, in that the people cannot be compelled by the king to sustain any public charge, except it be by their own consent in parliament."

Henry VII. (*z*), omitting Edward V. and Richard III., because of the shortness of their reigns, had indeed a more peaceable time than any of his predecessors; yet was he not altogether free from troubles within the realm, and from abroad. He was more provident and politic in the gathering and storing up of treasure, than ever was prince of this realm. He himself took the accounts of his revenues, and had for his assistants Empson and Dudley, men learned in the laws, and cunning in all profitable points of the prerogative; men who studied little else than the advancement of their master; men even till this day infamous for their wicked counsel, in persuading the

(*x*) Comines, Mem., Bk. iv. chap.
1.

(*y*) *Id.*

(*z*) This king had a subsidy of ton-

nage and poundage granted to him for his life, as appears by Rot. Parl. 1 Hen. 7, vol. vi. p. 268.

king to lay heavy burthens upon his people. Certainly, no cause can be imagined, that would have made these men forbear, unless either they were utterly ignorant of any such prerogative ; or, knowing it to have been claimed by some of the ancient kings, especially by Edward III., they knew likewise that it was continually complained of in parliament, and always condemned ; and that there were Acts of Parliament directly against it.

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In Henry VII.'s time an occasion offered than which none could better have justified the laying of impositions, which was this. The Venetians, in order to drive our merchants from buying sweet wines at Candia, and that they might the better employ their own ships and merchants, imposed upon every butt of malmsey brought thence by English merchants, four ducats ; by which means the English wholly lost that trade, and the Venetians made the profit thereof. This mischief was not better to be remedied, than by imposing the like, or a greater charge, upon merchants of Candia bringing malmsey into England ; so that there could not possibly have been a more justifiable occasion than this was, of laying impositions. And yet this king, so careful of preserving his prerogative, and most of all in matters that concerned his profit, though he saw it convenient, and in a manner necessary, conceived it to be unlawful so to do ; and therefore did it not by his absolute power, but by assent of parliament (*a*). Therefore it cannot be gainsaid, that in these times the pretended prerogative of laying impositions, without assent of parliament, was held to be against law.

There was not in the whole rank of our kings any one like Henry VIII. for excessive prodigality (*b*). The riches stored up by his father with so much care he so suddenly consumed, that he was forced to crave most unreasonable

(*a*) See stat. 7 Hen. 7, c. 7.

(*b*) Hen. 8 had a subsidy of tonnage and poundage granted to him for

his life, as appears by the Parliament Roll.

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aids of his parliament. Yet, that no means for raising money might be neglected, in the 15th year of his reign he sent out commissions into every shire throughout the realm, with instructions to the commissioners how they should behave in persuading the people to contribute to the king the sixth part of their estates, to be paid in money or in plate; whereupon the people were ready to rebel, had not the king stayed the proceedings of the commissioners. Finding that this method would not serve his turn, he demanded a benevolence; which not answering his expectation, he the same year raised treasure by abasing the gold coin.

Such things as these princes never put in practice, but when other means fail them; and yet King Henry VIII. went many degrees beyond this. For, in the 27th year of his reign, he suppressed above 370 religious houses, and sold their goods; and about four years afterwards he dissolved all the monasteries, abbeys, and other religious houses throughout England. By which means, and by the sale of their goods, he gathered much treasure. Yet within three years after he craved and obtained an excessive aid in parliament; and the year following he abased his coin more than half in half, such an abasement as never before or since was heard of, and which could not but be very grievous to the people; but because perhaps they held it lawful so to do, they made no public complaint thereof. And it is worth observing, that though this prerogative of abasing coin trenches as deeply as the laying of impositions on the private interests of the people; and though the practice of this prerogative has not been forborne by any of the kings of this realm, some of them having used it very immoderately; yet cannot there be found any public complaint on record against it, which argues that the subject distinguished between the two prerogatives, of laying impositions, and of abasing coin; thinking the one lawful and the other not. But to conclude these observations upon the actions of Henry VIII.

The next year after this unconscionable abasement of his money, he craved a benevolence. The year following he took the profits of all the chantries, colleges, and free chapels, &c., during his life, which ended the next year. Can any man imagine that during this king's reign it was held lawful to raise treasure by imposing?

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As to his son and successor, Edward VI., it seems that, if his governors had imagined that any such prerogative had been due to him, they would not have forborne the practice thereof for supplying the king's necessities, and instead thereof have craved of his subjects the unaccustomed and unreasonable subsidy, granted in the second year of his reign, of a certain sum of money upon every sheep and every cloth within the realm, for three years; which afterwards for the unreasonableness thereof was released.

Having now gone through the reigns of all our kings from Edward III. till Queen Mary, what more during that time can be imagined to have awakened impositions, if they had not been more than asleep? Neither the necessity of just and honourable war, nor the subtleties and curiosity of peace, neither the prodigality of some of these kings nor the covetousness of others, neither the softness of some of their dispositions nor the nonage of others apt to be abused by evil counsellors, neither the awe in which some of them held their subjects, nor the assurance of the people's extraordinary affection, which might have emboldened others, neither the evil conscience of usurpers, nor any other motive whatsoever, which happened during this long time, could revive them; until Queen Mary at last raised them out of the grave, after they had been so many years dead and rotten.

The first imposition that she laid was upon cloth, continued till this day, and founded on a special cause, viz., the loss sustained by reason of the difference between the customs and subsidies of wool and cloth, the custom of wool made into cloth having been less than the custom

Impositions
laid by
Queen Mary
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and subsidy of so much wool not made into cloth, which difference was reduced to an equality by rating upon every short cloth ten shillings. It may be worth observing, that the queen commanded this increase of custom to be yielded to her, not as an imposition or as an impost, but by the name of custom; because it was in lieu of the ancient custom upon wool; which is the reason why at this day it is demanded and paid by that name; whereas no other newly raised duty has that privilege, but is either called subsidy of tonnage or poundage, if raised by Act of Parliament, or impost, if raised by the king's absolute power. This imposition was complained of by the merchants of London, who "made exclamations and suit to the queen to be unburthened of this impost, because it was not granted by parliament, but assessed by Queen Mary of her absolute power;" whereupon there were divers conferences of the justices and others, whose resolution is nowhere to be found, though it is very probable that, if they had given judgment for the queen, it would not have been kept close. But the profit was too great to be taken from the Crown, and therefore it continues till this day.

The next imposition laid by Queen Mary was forty shillings upon a tun of French wine, imposed in the 5th year of her reign; at which time there was first a proclamation made, that no wines at all should be brought from France, being then at enmity with England, upon pain of forfeiture of the wines. Immediately after this restraint there was an order made by the queen and her privy council, that such as would might bring in French wines, notwithstanding the proclamation, paying forty shillings upon every tun by the name of impost, as appears by record of Easter term, 1 Elizabeth, in the office of the King's Remembrancer of the Exchequer in the case of one Germane Ciol, against whom an information was exhibited for not paying the said imposition. Whereunto, taking it by way of traverse, that there is any law

of the land by which he may be charged with impost, he pleads a licence made unto him, 1 & 2 Phil. & M., to import a certain number of tuns of wine within a certain time, any restraint then made or afterwards to be made to the contrary notwithstanding; provided always, that the custom, subsidy, and other duties due and accustomed to be paid to the king and queen, were duly satisfied; and he shows that, for all wines brought in by him during the life of Queen Mary, he paid the subsidy of tonnage, viz., three shillings for every tun, which was all that was due and accustomed to be paid. Upon this plea a demurrer was joined, and judgment given thereupon against the queen.

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About the same time impositions were laid also by Queen Mary upon all French commodities whatsoever to be imported, as may appear by the port-books of those times in the Exchequer; which impositions were received to the use of Queen Elizabeth in the beginning of the first year of her reign: but ere the year ended they were all taken away, as may appear by the same port-books, which is a great argument that they were not then held lawful; for princes do not so easily give up their hold in matters of profit, if there be any way to maintain it.

III. And now, admitting even that by the common law the king might at his will have laid impositions, yet so stands the law of England at this day, by reason of statutes directly in point, that the king's power, if ever he had any, to impose, is not only limited, but utterly taken away.

The king's
right to im-
pose—how
barred by
statute.

Magna Carta, c. 30, enacts as follows:—All merchants, if they were not openly prohibited before, shall have their safe and sure conducts, to enter and depart, to go and tarry in the realm, as well by land as by water, to buy and sell without any evil tolls, by the old and rightful customs, except in time of war. And if they be of a land making war against us, and be found in our realm at the

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beginning of the war, they shall be attached without harm of body or goods, until it be known to us, or our chief justice, how our merchants be intreated there in the land making war against us, &c.

The above statute is the most ancient statute-law we have, won and sealed with the blood of our ancestors; so revered in former times, that it has been by parliament provided (*c*) that transcripts thereof should be sent to all the cathedral churches of England, there to remain; that it should be twice every year publicly read before the people; that likewise twice every year there should be excommunication solemnly denounced against the breakers thereof; that all statutes and judgments given against it should be held void; that it should be received and allowed as the common law by all persons having the administration of justice; and it has been many times solemnly confirmed in parliament (*d*):—therefore, with so much the more care, should we endeavour to free this law from the objections made against it.

The first objection is that the above chapter of Magna Carta extends only to merchants being aliens, not to denizens. But it is improbable that the makers of the law should be more careful to provide for the indemnity of merchant-strangers than of Englishmen, unless they had imagined that English merchants were already sufficiently provided for by the common law. Again, the words are general, “all merchants;” and, *qui omnes dixerit nullos excipit*. Besides, the statute is a beneficial law; and, therefore, to restrain its general words would be against reason; and since no absurdity nor contradiction follows by interpreting the first words to extend to merchants in general, and the latter only to merchant-strangers, the most ample and beneficial construction is thus given to them.

Moreover, this objection is removed by two statutes

(*c*) 25 Edw. 1, cc. 1, 2, 3, & 4.

(*d*) *Ante*, p. 58, n. (*y*).

made by Edward III., declaratory of this very clause. The first is 2 Edw. 3, c. 9, the words of which are, "All merchants, strangers, and privies, may go and come with their merchandizes into England after the tenor of the Great Charter." The word "privies" in this place being derived from *privatus*, which signifies a particular property; as *res privata*, a man's own private estate; so the words, *mercatores privati*, signify our own merchants.

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The next statute explaining this chapter of Magna Carta is 14 Edw. 3, st. 2, c. 2. The words are, "Whereas it is contained in the Great Charter that all merchants shall have safe conduct, &c. We grant that all merchants, denizens and foreigners may safely come into the realm of England," &c., which is a mere declaration of Magna Carta.

The second objection made against this chapter of Magna Carta is, that the meaning thereof was to secure merchants, not from a new increase of custom to be imposed by the king, to be paid at their entrance or going out of the ports, such as our impositions are; but from certain petty exactions, as tolls and such like, which were then usually demanded of them within the land, by the towns through which they were to pass, and where they sold their merchandize. As to the words "buy and sell without evil tolls," it is argued that impositions are not paid upon the buying and selling of merchandize, but when it is shipped or unshipped. Toll being properly an exaction for passage within the land, or for sale in markets or fairs. The meaning of this statute, however, was principally to secure merchants touching impositions, as appears from the ordinance of 5 Edw. 2, heretofore mentioned, which alleges that Carta Mercatoria was against Magna Carta, the impositions laid by colour thereof being upon foreign commodities. If, then, Carta Mercatoria were adjudged to be against Magna Carta, only because by colour thereof new impositions were raised without assent of parliament, it is evident that Magna Carta was

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understood to have been made against impositions, not merely against petty tolls and exactions within the land. The words, "without any manner of evil tolls," by the old and rightful customs extend not only to the next precedent words, "buy and sell," but also to the former words, "enter and return:" for to provide that merchants should be free from petty exactions of tolls in markets, and for passing through cities and towns, and to leave them subject to impositions to be laid at the king's pleasure, had been but slender security. This exposition is confirmed by a record of 16 Hen. III., by which it appears that the king commanded his officers at the ports "to signify to all merchants, that they might with safety enter into his kingdom, paying the rightful and ancient customs," *nec timeant sibi de maletoltis quas faciet rex*.

Derivation
and mean-
ing of the
word "toll."

The word "toll" seems to be derived from *teolonium*, which signifies custom, by cutting off the latter part of the word and retaining only the first part, *teol*, by contraction "toll." *Teolonium* is derived from the Greek *Τελος*, which signifies as well *custom* as *finis* (c). Hence it is that the customers are called in Latin *teolonarii*. Hence the genuine and primitive signification of our word "toll" is custom upon merchandize. From the word "toll" come those two barbarous Latin words found in our statutes and records: *toltum*, used in the record of 16 Hen. III., that now vouched; and *tolnetum*, the original word in the statute now in question, which in our law Latin is used for toll in the market and toll for passage. But in this place, *malum tolnetum* properly signifies, not toll in the common sense, but an unlawful charge laid by the king upon merchandize, as an increase of custom, and the words *sine omnibus malis tolnetis per certas et antiquas consuetudines*, ought to be translated, "without impositions, by the old and rightful customs." This exposition is

(c) Calvin, *Lex Jurid. ad verb.* "Teolonium."

further warranted by the use of the word *maletolt*, so often found in our ancient statutes and records, which is derived from the Latin *malum tolnetum*. It is diversely written—*maletout*, *maletolt*; *maletot*, and sometimes *maletent*; but is never used in any other sense than for an imposition by way of increase of custom upon merchandize. Sometimes, indeed, though very rarely, it is taken in the best sense—for lawful and rightful custom, as the word “imposition” sometimes is; but then commonly it is accompanied by another word to free it from the worst sense, as *droiturel maletout*, &c.

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Impositio in pure Latin, or *imposition* in English, is the same with *maletolt* in French, or *malum tolnetum* in our law Latin, signifying a new increase of custom. And although the word “imposition” as also the words *maletout* and *malum tolnetum*, may be taken as well for a new increase of custom by a lawful means, viz., by assent of parliament, as for an increase of custom by the king's absolute power, which is unlawful: yet by the words that immediately follow, it is evident that this statute only intends unlawful impositions, i.e., impositions laid by the king's absolute power, without assent in parliament. Otherwise would they not have been opposed to due and rightful customs, as in the statute they are.

The word *consuetudo*, in its first and proper signification, means an usage or practice of a thing time out of mind. But it is evident by the records, temp. Hen. III. and Edward I., that this word in a more especial manner was applied to duties belonging to the Crown by reason of trade; as *consuetudo aquæ Thamesis*, *consuetudo piscis venientis ad vicum pontis London*, *consuetudo quæ vocatur scavegium*, *consuetudo quæ vocatur* “guage.” But yet more especially was it applied to that duty which we, because of the greatness of the revenue derived from it, *per excellentiam* call “custom.” And not only what belongs to the king by the common law and by ancient prescription was called *consuetudo*, but in later times, if there were any

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tio.”

“Consue-
tudo.”

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increase of that duty, though it came not by prescription, but by grant in parliament or otherwise, yet it retained the name *consuetudo*, which by continuance of time came to be the proper name for that kind of duty howsoever it began. Nevertheless the people called it by some worse name, as *maletolt*, or the like.

The word *consuetudo*, being applicable to all duties belonging to the Crown by reason of trade, is used in the plural number in Magna Carta, *per antiquas et certas consuetudines*, that so the merchants might be secure against all unjust exactions upon merchandize whatsoever, the principal scope of the Act being to provide against all impositions; and the word *consuetudo* being taken as well for impositions as for rightful customs, therefore, to make all sure, were inserted the words *antiquas et rectas*. The word *consuetudo* in this sense continued till about the twentieth year of Edward I., after which time, in place of it came the word *custuma*, which first appeared in Carta Mercatoria, where the increase of custom by the grant of merchant strangers is called *parva custuma*; and that which before was called *nova consuetudo*, now begins to lose that name and to be called *magna custuma*, signifying the increase made by parliament, anno 3 Edw. I., upon the three staple commodities, wool, woolfels, and leather; *parva custuma*, signifying the increase granted by merchant strangers, anno 31 Edw. I. This word *custuma* was promiscuously used by Edward I., Edward II., and Edward III., in their commissions, and applied as well to increase of custom by way of imposition, or by Act of Parliament, as to the ancient custom upon the staple commodities. But regularly *custuma* signifies that which is due upon the staple commodities, except only cloth; if it be laid by Act of Parliament, it is called a subsidy; if without assent of parliament, an impost.

The second statute against imposition, is that *de*

tallagio non concedendo (f). Though there be some dispute about the date of this statute, the occasion is agreed to have been the laying of a great imposition upon wool. The words of the statute are, "No tallage or aid shall be raised or set by us or our heirs in our realm, without the assent and good will of archbishops, earls, barons, knights, burgesses, and other freemen of the land." After which general words, by way of provision against all manner of burthens whatsoever to be laid in time to come without assent of parliament, follows especial provision for the taking away of the imposition then demanded upon wool (g). The word "tallage" above used is to be understood only of charges within the land, yet the word "aid" extends to all charges of what nature soever. This exposition of the word "aid," concurring with the occasion of making the statute, strongly enforces the argument drawn from it against impositions. And 'tis to be observed, that in this statute there is no saving or exception of the king's ancient right.

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Another statute against impositions is 25 Edw. 1, c. 7, the words of which are, "Forasmuch as the more part of the commonalty find themselves sore grieved with the maletolt of wools, and have made petition to be released of the same, we at their requests have clearly released it, and have granted for us and our heirs, that we shall not take such things, without their common assent and good will, saving to us and our heirs the custom of wools, skins, and leather, granted before by the commonalty aforesaid."

The king's intent was for ever to secure his subjects against impositions, not upon wool only, but upon any other merchandize. The petition was to be released only from the *maletolt* upon a sack of wool, which is yielded to. The security for the time to come is, "we will take no such thing," and the saving which follows extends not

(f) 34 Edw. 1, st. 4.

(g) 34 Edw. 1, st. 4, c. 3.

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to wool alone, but also to woolfels and leather, by which it is evident that the security for the time to come extends not to wool only. For else to what end should woolfels and leather be excepted in the saving, if they had not been contained in the general words, "no such thing"? An exception cannot be but of a thing contained in former words. If the grant would have extended to woolfels, had they not been specially excepted; by the same reason does it extend to all other merchandize not excepted, for the words are general.

The next statute made against impositions is the 14 Edw. 3, st. 1, c. 21, which recites that, whereas the Commons had prayed the king not to take of wool, woolfels, leather, tin, or lead, more than the ancient custom, the king prayed them to grant him 40s. upon a sack of wool for a year and a half, which they granted: whereupon the king, by way of answer to their petition, touching the wool, causes it to be enacted for their security in time to come, "that neither he nor his heirs would demand, assess, nor take more custom of a sack of wool than 6s. 8d.: and so likewise upon woolfels and leather, no more than the ancient custom, without assent of parliament." All this while there is no answer given touching the tin and lead mentioned in the petition; upon which, as it appears, the king had also laid impositions. But there follow certain general words, by which not only tin and lead, but all other commodities whatsoever are freed from impositions. The words are, "the king promised in the presence of his earls, barons, and others of his parliament, no more to charge, set, or assess upon the custom, but in manner aforesaid." Unless these words extend to lead and tin, to free them from future impositions, as wool, woolfels, and leather are freed by the former special words, the petition of the Commons touching tin and lead is no way answered. And if the words used extend to tin and lead, they must extend to all commodities. And although the king do but promise, yet doubtless in this case his

promise is a law. The above statute, 14 Edw. 3, st. 1, c. 21, was yielded to by the king, upon a petition exhibited the parliament before by the lords and commons, praying that a law might be made against impositions, at which time they likewise prayed, that the king would be pleased to grant them a charter to the same effect, to be enrolled in parliament. This charter follows immediately after the statute, wherein the king, reciting the great gift that had been given him by the same parliament, that is to say, the ninth sheaf, ninth fleece, and ninth lamb, throughout the kingdom (which, indeed, was a very extraordinary gift, so that the king's grant, in regard thereof, is to be construed more beneficially), in lieu thereof, for him and his heirs, grants to his subjects that: "From henceforth they shall not be charged, nor grieved, to make any aid, or to sustain charge, if it be not by the common assent of the prelates, earls, barons, and other great men, and the Commons of our said realm of England, and that in parliament." It has been objected that these words "aid" and "charge" (*h*) are to be understood of charges within the land, such as taxes and tallages, and not of impositions upon merchandize. The answer to which objection is, that this charter, as well as the statute already mentioned, was made upon a petition exhibited in parliament, for a law and charter to be made against impositions upon merchandize. Therefore the conjecture that it extends only to taxes, not to impositions, falls to the ground; especially since there is not in the petition any mention at all of taxes or tallages, or of any other charge or aid save impositions. Besides, the mischief at the time of making this law, was not tallages or taxes, but those heavy impositions upon wool, by way of dispensation with the stat. 11 Edw. 3, c. 1, formerly mentioned. Moreover, the words of this statute being general may with reason

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(*h*) Under the words "aid" and "charge" impositions were formerly included. *Vid.* Rot. Parl. 21 Edw. 3, Nos. 11, 16, vol. ii. p. 166.

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favour of
imposing
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be extended to all dispensations for money with penal laws. In particular the raising of money by dispensations with the statutes against ale-houses is, by the force of this charter, unlawful; for *quod prohibitum est unâ viâ, non debet aliâ permitti*.

IV. The reasons urged in favour of impositions may be thus answered:—

1. It has been said, that the old custom of a demi-mark upon a sack of wool must have had its beginning either by the king's absolute power, or by assent of the people, which can only be in parliament, and would appear of record; and because no such assent can be shown, therefore it is said to have begun by the king's absolute power.

There cannot, however, be any question that the custom of the demi-mark, and the other old customs, were by grant in parliament (i). But this question, how began the first customs? is best answered by another question, how began the fine for purchase of original writs, the certainty of prisage, the trial of issues by twelve jurors, or the rule that the full age of a man should be accounted twenty-one years? In effect, who reduced to certainty the common law? Because we cannot tell how or when the customs began, shall we conclude that they began by the king's absolute power, and infer that they may be changed at his pleasure? In truth, these things began by a tacit consent of king and people, and long approval beyond the memory of man.

2. It is further objected that the king may restrain the passage of merchants at his pleasure, and if he may restrain a merchant from passing at all, he may restrain him from passing unless he pay a sum of money: for *cui licet quod majus, licet etiam quod minus*.

To this it may be answered that the king cannot restrain the passage of merchants, but for some special cause; as by reason of enmity with such a nation whence

(i) See stat. 25 Edw. 1, c. 7.

they are restrained, or because such a commodity may not be spared within the kingdom. Restraints in these and the like cases being by the common law left to the king's absolute prerogative, for otherwise it may be in the power of a merchant for private lucre to enrich the king's enemies, or to furnish them with munition to be employed against the state, or utterly to ruin the commonwealth by carrying out a commodity which could not be spared, or by bringing in some which might be hurtful. Nay, on occasion, the king may stop the passage of merchants from all places for a short time. There may likewise be such need of their ships that the want of them might be a cause of overthrow of the state. In such cases as these, if the common law did not give the king leave to restrain by his absolute power, it would be very improvident. And yet the kings of this realm have always been sparing in exercising their power in this particular. But although the king may by his absolute power restrain the passage of merchants; does it therefore follow that he may impose upon such as pass? That because the king may restrain totally, he may restrain for a time, or from certain places, or may restrain certain commodities or certain merchants, might be a good argument, *à majori ad minus*. But that because he may restrain totally, therefore he may give passage for money, is not such. If there be just occasion for restraint, the law gives the king power to restrain. But when merchants may without hurt to the state have passage, to force them to pay for that passage is as unlawful as to force a man to pay for doing that which he may lawfully do. Merchants have as good inheritance in their trade, as any man in his lands; and when compatible with the good of the state, they ought to pass as freely as a man ought to hold his inheritance, or an artificer or other tradesman ought to exercise his lawful trade, free from burthens to be imposed by the king's absolute power. If it be a good argument, that because the king may restrain *in toto*, he may restrain

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in tanto; it will not be denied that in cases where he cannot restrain *in toto*, he cannot restrain *in tanto*. But no man will say that he may restrain the entrance and passage of all merchants, to and from all parts of the world without limitation of time, and for all kinds of merchandize; no man will say that the law has given the king power to make so unreasonable a restraint as this: for it were to give him a power to destroy merchandize, and consequently to ruin the commonwealth.

3. The next objection is that "the ports of England are the king's; therefore he may open and shut them upon what conditions he pleases." To this it may be answered—The proposition that all the ports are the king's, is not generally true; for subjects may also be owners of ports. But admitting the truth of the proposition, the deduction from it is dangerous. For are not all the gates of cities and towns, and all the streets and highways in England the king's, and as much subject to be open or shut at his pleasure, as the ports are? When we speak of the highway in law, we call it *via regia*, the king's highway; and the king in his commissions, speaking of London, or any other city, calls it *civitas nostra* London, or *civitas nostra* Exon. Does it follow, therefore, that the king may lay impositions upon every man, or upon all commodities passing through any of these places? Nay, the gates of the king's palace of Westminster are his in a far nearer degree than any of these. May he therefore by his proclamation impose upon every man passing into or out of Westminster-hall? Doubtless he may not; because the king is a public person, and his subjects ought to have access to him, as to the fountain of justice, and to the courts of justice sitting by his authority. There can be little doubt, but his Majesty may upon just occasion cause any of these passages to be shut. But when without danger to the state subjects may pass, his Majesty may not exact money for their passage; for the law has given the king power over these things, for the

good of the commonwealth, and not thereby to charge and burthen the subject. If the king may not exact money for passage in and out of his court gates, nor for passage through the gates of cities ; much less may he for passage out at the ports, which are the great gates of the kingdom, and which the subject ought as freely to enjoy, as the air or the water.

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4. Another argument is this—"The king is bound to protect merchants from the enemy ; he ought to fortify the havens, that merchant ships may abide there in safety ; he ought, if occasion be, to send ambassadors to foreign princes, to negotiate for them : " and many like charges is the king by law to undergo for the protection of his merchants. It is reasonable, therefore, that his expense be defrayed out of the profit made by merchants ; and consequently he may impose upon merchandize a moderate charge thereby to repay himself. The consequence of this argument is thus far true. The law expects that the king should protect merchants. Therefore it allows him out of merchandize a revenue for the maintenance of his charge, which is the old custom due, as before said, by the common law. But it does not follow that therefore he may take what he lists.

5. Another argument is this—"All other princes of the world may impose upon merchandize at their pleasure ; and so make our merchandize less vendible with them, by laying an imposition upon it to be paid by us, when brought into their territories. They may also lay impositions upon our merchants buying commodities abroad, and leave their own merchants free from imposition ; by which their merchants will reap a profit, and our merchants will be undone." To this it may be answered that, during the time from Edward III. till Queen Mary, doubtless it sometimes fell out that foreign princes exercised their power to our prejudice, and yet we hear not of any imposition laid by any of our kings by their absolute power ; which may give assurance that they took

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some other course to meet the inconvenience; and indeed the means are divers, which these kings used to prevent it. First, they were careful, in all their leagues and treaties with foreign princes, especially to provide for it; for further security, our kings have always had ambassadors resident in the courts of such foreign princes, to put them in mind of their leagues, if upon any occasion our merchants happened to be wronged by them; and if, upon complaint of the ambassador, our merchants have not found redress, our kings have held the league as broken, and declared war or seized the goods of the foreign merchants within England; and probably there have been more wars undertaken by our princes for this cause than for any other.

Besides, our kings have in this case sometimes made use of their prerogative of restraint, either by prohibiting our merchants from carrying our commodities into those parts, where they are charged with impositions, that so, through want of our commodities, foreign princes might be forced to abate the impositions laid upon them; or by restraining foreign merchants from importing or exporting commodities from hence; by which means foreign princes have been compelled to deal favourably with our merchants for the good of their own subjects. All these are lawful and ordinary means for preventing or redressing the inconvenience which may ensue from impositions by other princes. If these ordinary means should fail, and the laying of impositions be indeed the only means left to redress the inconvenience, why should not that be done by Act of Parliament in these times, as it was by stat. 7 Hen. 7, c. 7 (*k*); and as it was by queen Elizabeth (*l*)?

Conclusion.

So we may conclude that impositions, not even in the time of war, much less in time of peace, neither upon foreign nor inland commodities, be they superfluous or

(*k*) *Ante*. p. 281.

(*l*) 19 Eliz. c. 10.

unnecessary, neither upon merchants, whether strangers or denizens, may be laid by the king's absolute power for ever so short a time without assent of parliament.

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The debates in the House of Commons which gave rise to the researches of Mr. Hakewill and other learned lawyers, resulted in a Petition of Grievances addressed to King James I., A.D. 1610, of which the part concerning impositions was thus worded (*m*):—

Petition of
Grievances.

“The policy and constitution of this your kingdom appropriates unto the kings of this realm, with the assent of the parliament, as well the sovereign power of making laws, as that of taking, or imposing upon the subject's goods or merchandizes, wherein they have justly such a property, as may not without their consent be altered or changed.

“This is the cause that the people of this kingdom, as they ever showed themselves faithful and loving to their kings, and ready to aid them in all their just occasions with voluntary contributions; so have they been ever careful to preserve their own liberties and rights, when anything hath been done to prejudice or impeach the same.—And, therefore, when their princes, occasioned either by their wars, or their over great bounty, or by any other necessity, have, without consent of parliament, set impositions either within the land or upon commodities either exported or imported by the merchants; they have in open parliament complained of it, in that it was done without their consents; and thereupon never failed to obtain a speedy and full redress, without any claim made by the kings of any power or prerogative in that point. And though the law of property be originally and carefully preserved by the common laws of this realm, which are as ancient as the kingdom itself; yet these famous kings, for the better contentment and assurance of their loving subjects, agreed, that this old

(*m*) See Petyt, Jus. Parl. 322, 323.

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fundamental right should be farther declared and established by Act of Parliament: wherein it is provided, that no such charges should ever be laid upon the people, without their common consent; as may appear by sundry records of former times.

“We, therefore, your Majesty’s most humble Commons assembled in parliament, following the example of this worthy care of our ancestors, and out of a duty to those for whom we serve, finding that your Majesty, without advice or consent of parliament, hath lately in time of peace set both greater impositions, and far more in number than any your noble ancestors did ever in time of war, have with all humility presumed to present this most just and necessary Petition unto your Majesty.

“That all impositions set without the assent of parliament may be quite abolished and taken away: and that your Majesty, in imitation likewise of your noble progenitors, will be pleased, that a law may be made during this session of parliament, to declare that all impositions set, or to be set upon your people, their goods or merchandizes, save only by common assent in parliament, are and shall be void: wherein your Majesty shall not only give your subjects good satisfaction in point of their right, but also bring exceeding joy and comfort to them which now suffer; partly through the abating the price of native commodities, and partly through the raising of all foreign; to the overthrow of merchants and shipping; the causing of a general dearth and decay of wealth among your people, who will be hereby no less discouraged than disabled to supply your Majesty, when occasion shall require it.”

Besides the remonstrance against impositions generally offered by the House of Commons, complaint was specially made of two grievances: the tax on alehouses (alluded to by Mr. Hakewill at page 294), and the impost which had been laid on coal at certain places by the royal prerogative. In regard to the former, of which the Com-

mons, setting forth that by the laws of England no taxes, aids, or impositions of any kind ought to or can be imposed upon the people, or their goods, but by consent of parliament, complained of the tax or imposition laid yearly upon those who kept victualling-houses, or sold ale and beer by retail: such imposition not being laid by assent of parliament, but under letters and instructions from the Crown.

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The Commons urging that the said taxation was without example, and in itself a precedent of dangerous consequence, easily to be extended farther, besought the king that former letters and instructions issued for levying the tax in question might be countermanded or stayed, and all further directions and proceedings of that kind forborne.

Further, the Commons complained of impositions: which beginning at first with foreign commodities, brought into or exported out of the realm, had been extended to commodities growing in the kingdom, and consumed by the subjects thereof; particularly of the impost on sea-coals at Sunderland, such impost not having been levied by virtue of any contract or grant, but under mere pretext of the king's prerogative: "Which imposition is not only grievous for the present (especially to those of the poorer sort, the price of whose only and most necessary fuel is thereby to their great grief enhanced), but dangerous also for the future, considering that the reason of this precedent may be extended to all the commodities of this kingdom."

The Commons therefore prayed his Majesty, the great and sovereign physician of the state, to apply such a remedy that the diseases specified might be presently cured, and all diseases for time to come of like nature be prevented.

In reply to the above remonstrance of the Commons, the king was pleased to direct that the imposition upon alehouses and that on coal should be remitted; and

Answer of
the king.

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CASE.
Grant of a
subsidy.

although the concessions thus made by him were small in comparison with the demands made, they were so far favourably received that in acknowledgment of them a subsidy was granted to the Crown (n).

(n) Parl. Hist. vol. i. p. 1133.

THE CASE OF SHIP-MONEY, 3 St. Tr. 825 (o).

(13 Car. 1, A.D. 1637.)

RIGHT OF THE CROWN TO LEVY MONEY FOR DEFENCE
OF THE REALM.

The sovereign cannot, without the assent of parliament, assess and levy ship-money.

The first writ for ship-money—devised by Mr. Attorney-General Noy—was issued on the 20th October, 1634, to the mayor, commonalty, and citizens of London, and was followed by other writs directed to the sheriffs of counties, as well inland as maritime, to a like purport—*ex. gr.*, to the sheriff of Bucks, the bailiff of Buckingham and others (4th August, 1635)—in the following terms :—

“Because weare given to understand that certain thieves, pirates, &c., take away and despoil the ships, goods, and merchandize, not only of our subjects, but also of the subjects of our allies upon the sea, which of old used to be defended by the English nation ; and at their pleasure have carried away the men therein, enslaving them in a most wretched captivity : And whereas we see them daily preparing shipping further to annoy our subjects, and to aggrieve the kingdom, unless a more speedy remedy be applied, and their endeavours be more vigorously obviated : Considering also the dangers which everywhere in these times of war hang over us ; so that it behoves us and our subjects to hasten the defence of the sea and kingdom with all possible expedition. We being willing by the help of God in the highest degree to provide for the defence of the kingdom, the protection of the sea, the security of our subjects, the safe convoy of shipping and merchandize coming to our kingdom of England, and going from the said kingdom to foreign parts : And since

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assess and
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(o) *Rex v. Hampden* (in the Exchequer and Exchequer Chamber).

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we and our progenitors, kings of England, have hitherto been lords of the sea aforesaid ; and it would in the highest manner concern us, if this royal honour should in our day be lost, or any ways diminished ; since also this burthen of defence, which touches all, ought to be borne by all, as hath been accustomed to be done by the law and custom of the kingdom of England : We firmly enjoin and command you, in the faith and allegiance whereby you are bound to us, and as you love us and our honour, as also under the forfeiture of all things you can possibly forfeit to us, that you cause to be fitted out one ship of war of the burthen of 450 tons, with men, as well skilful officers as able and experienced mariners, a hundred and fourscore at least ; as also with a sufficient quantity of cannon, muskets, &c., as also with competent victuals for so many men, until the 1st day of March now next ensuing ; and from thence for twenty-six weeks at your costs, as well in victuals, as the men's wages, and other things necessary for war by that time, on account of defending the sea at our command in company with the admiral, to whom we shall before the aforesaid 1st day of March, commit the custody of the sea, to be and remain where he on our behalf shall appoint ; and that you cause the same to be brought into the port of Portsmouth before the said 1st day of March, so that they may be there that day at farthest ; thence to proceed with our ships, and the ships of other loyal subjects, for the protection of the sea, the defence of you and yours, to repel and vanquish all those, whosoever they are, that endeavour to molest and annoy on the sea our merchants and other loyal subjects aforesaid, coming into our dominions on account of traffic, or returning thence to their own country."

The writ next proceeded to direct the sheriff, bailiff, and others, within thirty days after receiving it, to assess as much of the charges aforesaid upon certain boroughs within his shire as ought severally to be laid on or assessed. And if such assessment within the aforesaid thirty

days should not be made, then to make such assessment upon the aforesaid boroughs, &c., as he should see reasonable to be done.

The writ proceeded thus :—" We have also appointed you the aforesaid bailiff of the borough and parish of Buckingham, to assess every man in the said borough and parish, and in the members thereof, and the land-tenants in the same, not having the ship aforesaid, or any share thereof, or not serving therein, to contribute to the expenses about provision of the necessary premises ; and to assess and lay upon the aforesaid borough and parish with the members thereof, so as aforesaid, that is to say, every one of them according to their estate, goods, and employment, and the portions on them assessed by distresses or other due ways and means to levy, and collectors in that behalf to nominate and appoint ; and all those whom you shall find rebellious and refractory in the premises to imprison, there to remain till for their delivery we shall further think fit to direct.

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" And further, we command you all, that you diligently apply yourselves to the premises, and effectually do and execute the same, as you shall answer the contrary at your peril. But our will and pleasure is, not that under colour of our mandate aforesaid you cause to be levied from the said persons more than shall suffice for the necessary expenses of the premises ; or that any one who shall levy any money of the contributors to the charges aforesaid, detain the same or any part thereof in his own possession, or presume to appropriate it to other uses under any pretence or colour whatsoever. It being our will, that, if more shall be collected than is sufficient, the same be paid back again to those who shall have so paid the same, according to every man's respective share and proportion."

With a view to determining the legality or otherwise of the writs for ship-money, before their validity could be solemnly discussed, the following questions were submitted

Questions
submitted
to judges.

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Questions
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privately to the judges by the king: "When the good and safety of the kingdom in general is concerned, and the whole kingdom is in danger; Whether may not the king, by writ under the great seal of England, command all the subjects of this kingdom, at their charge to provide and furnish such number of ships, with men, victuals, and munition, and for such time as he shall think fit, for the defence and safeguard of the kingdom from such danger and peril; and by law compel the doing thereof, in case of refusal or refractoriness? And whether, in such a case, is not the king sole judge, both of the danger, and when and how the same is to be prevented and avoided?"

Answers
thereto.

To these questions the answers given by the judges were as under:—"That when the good and safety of the kingdom in general is concerned, and the whole kingdom in danger, your Majesty may, by writ, under the great seal of England, command all the subjects of this your kingdom, at their charge to provide and furnish such number of ships, with men, munition, and victuals, and for such time as your Majesty shall think fit, for the defence and safeguard of the kingdom from such danger and peril: and that by law your Majesty may compel the doing thereof, in case of refusal or refractoriness. And we are also of opinion, that in such case, your Majesty is the sole judge, both of the danger, and when and how the same is to be prevented and avoided."

Proceedings
against Mr.
Hampden.

The sum of 20s. assessed upon Mr. Hampden, under the writ above set out, not having been paid, proceedings against him were taken in the Exchequer, whereto he appeared, and having demanded oyer of the writ, demurred to it as insufficient in law. Upon this demurrer Mr. St. John argued, on behalf of Hampden, as follows:—

Argument
against ship-
money.

By the above writ—dated 4th August, 11 Car. I.—the thing commanded is, that the county of Bucks should provide a ship of war of 450 tons, with 180 men, guns, tackling, victuals, &c., and bring her to Portsmouth by the 1st of March following: and from that time provide

for her victuals, mariners' wages, and other necessities for twenty-six weeks. For effecting this, there is power given to assess each person within the county *secundum statum et facultates*, and to bring in these sesses by distress, *et quos rebelles invenirent* to imprison their persons.

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money.

If the writ had staid here, and gone no further, the command had been void in law, because as yet it appears not for what end this ship was to be provided. A commission to seize men's goods notoriously suspected of felony, before conviction, has been adjudged void, because the command, without cause shown sufficient in law, would be void. Therefore the reasons for making the assessment are set down to be: *pro defensione regni, tuitione maris, securitate subditorum, et salvâ conductione navium*, both outward and inward, the sea being infested with pirates, and more shipping being daily prepared *ad regnum gravandum*.

Analysis of
the writ.

The legality of the requirement that every man *secundum statum et facultates* should be assessed, is enforced: 1st. From custom and continued use, in these words: that the sea *per gentem Anglicanam ab olim defendi consuevit*. 2ndly. From a common ground of equity, *onus defensionis, quod omnes tangit, per omnes debet supportari*; backed by the common law in these words: *prout per legem et consuetudinem regni Angliæ fieri consuevit*. The argument standing thus: all have benefit by defence of the realm; therefore by law the charge ought to be borne by all.

Then it is inferred that every man, by his allegiance, is bound to contribute to this charge, the command being *in fide et legiantiâ quibus nobis tenemini*.

Of these parts the writ consists; the scope and end of issuing it being the defence and safety of the kingdom; a thing so necessary that it must needs be legal; for it were a conceit of the law to confine its care to the preservation of the members of the body politic from wrongs by others, and, nevertheless, to leave the whole to the

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violence of enemies: so that whilst each subject might have a sure estate in his lands, and property in his goods, not to be impeached by any within the realm, the subjects, considered all together, would have only *precariam possessionem*, or a tenancy at the will of foreigners. This cannot be; for the law even afar off foresees and prevents dangers of this kind; *ex. gr.*, an alien, though a friend, has not capacity to purchase land within the realm (*p*). And if the law be so quick-sighted that, to prevent a possibility of danger, it prohibits strangers from having land within the realm who desire to come by it peaceably and for valuable consideration, we may surmise the care it takes to prevent dangers from open violence and force.

So that in this case the question is not *de re*, for by law the safety of the realm is to be provided for; *salus populi suprema lex*: neither is the question *de personis*, in respect either of the persons who are to bear the charge, or of those whom the law has intrusted with this defence.

As to the persons who are to bear this charge, the writ says: *quod omnes tangit per omnes debet supportari*: and the reasons for this are weighty, and agreeable to the rule of the civil and of the common law, *qui sentit commodum, sentire debet et onus*: so that the burthen lies upon all, for our *bona naturæ*, our lives and persons, are as dear to one as to another: and the charge is to be borne *secundum statum et facultates*; because the greater the estate and means of livelihood, the greater the benefit by the defence. The law in this case of defence against the invasion of enemies, being the same as in that of inundations of our soil by the sea or fresh water. All who have defence must be assessed, the assessment being equally distributed, and laid upon every man within the level, *pro ratâ portionis tenuræ suæ, seu pro quantitate communis pasturæ vel piscariæ*. The more land, common, or benefit of

fishing each man has, according to the proportion thereof the sess must be.

Neither is there any question but the law has intrusted his Majesty with this defence. The protection which we have for our bodies, lands, and goods, as against any within the realm, we know is from him ; all legal jurisdiction, ecclesiastical and civil, being wholly in him. The same is it in case of foreign defence. The king calls the kingdom *regnum nostrum*, and every city and great town *civitatem et villam nostram*, not *quoad proprietatem*, but *quoad protectionem et defensionem*. Neither has the law invested the Crown with sovereignty only as *honorarium*, but for the good and safety of the realm. The king *ratione regie dignitatis et per juramentum est astrictus ad providendum salvationi regni undique* ; so that both in honour and by his oath he is bound to provide for the safety of the realm, and that *circumquaque*.

By law the king is *paterfamilias*, not only to keep peace at home, but to protect his wife and children, and whole family from abroad. It is his vigilancy and watchfulness that discovers who are our friends, and who are our foes, and after such discovery warns us of them ; for he only has power to make war and peace.

Neither has the law only entrusted the defence of the kingdom to his Majesty, it has likewise put the means of defence in his hands ; it is not in the power of the subject to order it by sea or land, for no man without commission or special licence from his Majesty, can send forth ships for that purpose ; neither can any man without such commission or licence, unless upon sudden coming of enemies, erect a fort or bulwark, even upon his own ground.

Nor is his Majesty armed only with his prerogative of generalissimo and commander-in-chief, so that none can advance towards the enemy, until he gives the signal, nor in other manner than according to his direction : he is armed with all other powers requisite for the full execution of things incident to so high a place, as well in times

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of danger as of actual war. The sheriff of each county, who is but his Majesty's deputy, has the *posse comitatûs*: therefore it must needs follow, that the *posse regni* is in the king.

And it must be granted that in this business of defence, the *suprema potestas* is inherent in his Majesty, as part of his crown and dignity. Therefore, the law of England provides, in the first place, for foreign defence; and secondly, lays the burthen upon all; making the quantity of each man's estate the rule whereby this burthen is to be apportioned. So has it, in the third place, made his Majesty sole judge of dangers from abroad, and when and how the same are to be prevented; and it has given him power by writ under the great seal of England, to command the inhabitants of each county to provide shipping for the defence of the kingdom, and he may by law compel the doing thereof. Hence the question will not be *de personâ*, in whom is the *suprema potestas* of giving the authority to the sheriff, mentioned in this writ, for that is in the king: but the question is only *de modo*, by what method this supreme power is to be applied.

The forms and rules of law have not been observed in this case. For as, without the assistance of his judges, his Majesty applies not his laws, so neither without the assistance of his great council in parliament can he impose. Parliament is his Majesty's court. It is his Majesty that gives life and being to it, for he only summons, continues and dissolves it, and by his *le veut* enlivens all its acts. It is indeed sometimes called *commune concilium regni*, because the whole kingdom is representatively there; because the king's subjects have access thither in things that concern them, other courts affording relief but in special cases: and, because the whole kingdom is interested in, and receives benefit by the laws there passed: Yet it is *concilium regni* no otherwise than the common law is *lex terræ*, that is *per modum regis*. The parliament is the king's court;

Habet rex curiam suam in concilio suo in parliamentis suis (q).

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Acts of Parliament had anciently so much of the king's name and style in them, that it was a hard matter to know whether they had anything of the parliament in them or not (r). And from those times until now, Acts for the most part commence thus: "It is enacted by our sovereign lord the king, with the assent of the lords spiritual and temporal, and commons." The king was and still is *pars agens*, the rest are but *consentientes*.

Without assistance in parliament, his Majesty cannot in many cases communicate either his justice or his power to his subjects,—Hence it follows that the kingly dignity most manifests itself there; which was the opinion of all the judges of England, *temp.* 34 Hen. VIII., who, by the king's command, meeting together about a point of privilege of parliament, the king afterwards declaring their opinions, does so in these words: "Further, we be informed by our judges, that we at no time stand so highly in our estate royal, as in the time of parliament, wherein we as head and you as members, are conjoined and knit together in one body politic" (s).

It appears not by the record, that this writ, giving power to sell and alter the property of the defendant's goods, issued from his Majesty sitting in parliament, and therefore it cannot be intended so to have done. If therefore it has issued from his Majesty otherwise than in parliament, the question is, whether it be erroneously issued or not?

The case now put concerns not the defendant only, it concerns his Majesty and the whole State. His Majesty is concerned in executing the trust which the law has reposed in him for the safety of the kingdom; the subject is concerned in his property. And the

(q) *Fleta*, lib. ii. cap. 2.

(s) *Crompton*, *Jurisdict.* fo. 10.

(r) *The Prince's Case*, 8 Rep. 14.

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question is concerning the validity of the writs, which extend to the altering of the property of the subjects' goods without their consent; this being for the defence of the kingdom at land and sea—*pro defensione regni, tuitione maris, securitate subditorum, salvâ conductione navium*, both outward and inward.

What are
legal means
for defence
of the realm.

In the first place shall be presented the known and undoubted means whereby the law has provided for the defence of the realm both at land and sea. The first whereof is by tenure of land. The services hereby due being of two sorts; service in kind, for land and sea, and supply to his Majesty for that purpose.

The second mode is by prerogatives settled in the Crown for defence of the kingdom.

The third is by supplies of money for defence of the sea in times of danger.

By tenure of
lands.

The kings of this realm, as they are the head of the commonwealth, so are they the head and root whence all tenures spring; for all lands within the realm are held mediately or immediately of the Crown. As therefore the law has appropriated the defence of the kingdom to the king, so has it trusted him with the reservation of such tenures, as might serve for that purpose.

Everyone holding by a knight's service, from a whole knight's fee to any part thereof, ought to find a man completely armed for the war. He who holds a knight's fee ought to be forty days in the service; and he who holds a moiety of a knight's fee twenty days; and so in proportion. *Temp.* Hen. II., Edward I., and Henry VI. there were many thousand knight's fees held of the Crown. And it is said, that in the Conqueror's time there were thirty thousand held of him.

But it may be objected that, inasmuch as these services are reserved by the king, they were not instituted solely for defence of the realm, but might be exacted for foreign wars; and that such may be inferred, 1st, from the name by which our old books and deeds style this service when

due to the Crown, viz., *forinsecum servitium*; and 2ndly, from its having been performed in Normandy, Gascony, &c. (t).

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To the former objection, the answer is that anciently, when those holding immediately of the Crown by this service infeoffed others of the land so held, besides the service reserved to themselves, they commonly in the conveyance made provision for their own acquittal against the king, and the feoffee took the whole service upon himself. And in these deeds of feoffment, after the reservation to the feoffor, was this clause: *et faciendum inde*, sometimes *forinsecum servitium*, sometimes *regale servitium*. Bracton (u) and Fleta (x) say that it is called *regale servitium quia est servitium domini regis*. By the same authors it is also called *forinsecum, quia capitur foris sive extra servitium, quod fit domino capitali*.

To the second objection, that knight's service has been often performed beyond sea, it may be answered that escuage, which is the penalty upon the tenant for default in performing such service, can only be assessed in parliament: which proves that the king cannot command this service, otherwise than for the good and defence of the realm.

That this service was instituted for defence of the realm, appears further by the care which the law has always taken to increase and preserve it, *ex. gr.*, if the lord purchase part of the land, yet the whole service remains: so in the Statute of Mortmain, 7 Edw. 1, st. 2, the mischief by conveying lands to religious houses is expressed to be *quod servitia quæ ex hujusmodi feodis debentur, et quæ ad defensionem regni ab initio provisæ fuerunt, indebite subtrahuntur*. And, besides the declaration that they are for the defence of the realm, that statute likewise provides for the increase of them; for, if

(t) Co. Lit. 68, b. *et seq.*

(x) Lib. iii. cap. 14.

(u) Lib. ii. c. 16, fo. 36, 37.

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the lord enters not within a year and a day after the feoffment, the king is to enter; and the words of the statute are observable, viz., *alios inde feoffabimus per certa servitia nobis inde ad defensionem regni nostri facienda*, for though the service is to be done to the king, it is to be done *ad defensionem regni*. Moreover, scutage is said to be due *inveniente in regnum hostium machinatione* (y), *propter exercitum et patriæ tuitionem* (z), and to be performed *certis temporibus cum casus et necessitas evenerit* (a).

It is observable that the services above mentioned are not created *ex provisione hominum*, but *ex provisione legis*; for if the king grant land without reserving any service at all, the patentee will hold the land by knight's service *in capite*. In Stamford (b), it is said that the first kings of this realm had all the land of it in their own hands; and in transferring these lands the care of the law was, that all the transferees should by tenure be made liable for the defence of the kingdom.

And because the tenure by knight's service ties the tenant only to forty days' service for the defence of the realm in general, divers other tenures for particular and certain services were reserved—as grand-serjeanties, some whereof were for service of honour in times of peace (c), and some for military service, *ex. gr.*, to carry the king's banner, to summon the tenants *ad exercitum*, some to be of the vanguard, some of the rear; some to serve in Wales, some in Scotland, some *infra quatuor maria*, some *infra Cinque Portus Angliæ*. Speaking of these military serjeanties, Coke (c) says that they were for the safety of the realm, and Fleta (d) observes that *magna serjeantia regem tantum respiciunt et patriæ defensionem*. Of this nature is the tenure of cornage, to give warning of enemies

(y) See the Black Book of the Exchequer, fo. 3.

(z) Bracton, lib. ii. c. 16, fo. 36, 37.

(a) *Id.* fo. 36.

(b) *Prerog.* fo. 10.

(c) *Co. Lit.* 106, a.

(d) *Lib.* iii. cap. 16.

coming into the kingdom, and the tenure by castle-guard, to defend the castles when an enemy enters the realm. And there are petty serjeanties for the finding of armour of all sorts for the war.

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That former kings executed the power derived from tenures for defence of the realm, according to the trust the law reposed in them, appears further in this, that in places exposed to the greatest danger there were most of them. All along the sea-coast of Kent and Sussex, nearest France, are the Cinque Ports, which have jurisdiction within themselves, that the inhabitants might not be compelled to travel out of them for justice, and other privileges; both to induce the people to live there, and to encourage them to the defence of those parts. And Dover Castle, the key of the kingdom, has about two hundred tenures by castle-guard, besides divers tenures for the repairing of the castle. On the borders of Scotland we find the franchisement of the bishopric of Durham, instituted for the defence of those parts; which William the Conqueror first made a county palatine, appointing a bishop thereof, *ut refrænaret rebellionem gentis gladio, et reformaret mores eloquio* (e). And in Cumberland, Northumberland, and Westmoreland, are more such tenures for defence of the realm, than in any of the inland counties.

Along the marches of Wales was another county palatine—that of Chester—to oppose the Welch invasions; and there were many lords marchers of baronies, who had administration of justice *secundum legem Marchiæ*, and for service to be done against the Welch had special privileges.

Of such military services the king is in the actual possession by taking the profits of wards' marriages, releases, licences, forfeitures for alienation, and *primer seisin*.

Inasmuch, however, as military service was not alone sufficient for the defence of the realm, divers other tenures

(e) Will. Malmesbury, fo. 157.

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were created to supply his Majesty with money for that purpose. All men, however, within the kingdom, are not equally inheritable, either to the body or to the property of lands or goods, but there are degrees and ranks amongst them differing from each other: 1. Villeins. 2. Freeholders, by knight's service, or free socage. 3. Tenants of ancient demesne, or holding by burgage within cities and boroughs.

1. The villein, as to his lord, had freedom in neither particular above specified; in respect of his body he could not *ire quo voluit*; but the lord at his will might imprison him, and in respect of his land and goods might tax him *de haut et de bas*.

2. Freeholders constituting the greatest part of the realm, always had absolute freedom in person and property.

3. Tenants in ancient demesne and burghers had an absolute freedom in their persons, but qualified in their property, not taxable at will, as villeins; though for the defence and necessary affairs of the realm, they might be taxed without consent of parliament. The same is it of burgesses within cities and boroughs.

Tenants in ancient demesne were to plough and manure the king's lands, being his demesne. And they, as well as burgage tenants, were anciently talliable without their consent in parliament. They were not so, however, at the king's will and pleasure, but only for the defence and necessities of the state.

So much for tenures, the first means whereby the law has provided for the safety of the realm; which of themselves not sufficing, the law, besides the honours, manors, and other revenues of the Crown, for our support of ordinary charges, has appointed divers prerogatives, for extraordinary charges, and for defence of the realm, as one of the chiefest of them.

Prerogatives
vested in the
Crown, how
employed.

That things coming to the Crown by prerogative are to be employed for the defence and public affairs of the realm may be thus shown. All the king's prerogatives are

jure coronæ, and to be employed for the common good. The reason why the king has treasure-trove, and gold and silver mines, is because he is thereby to defend the kingdom (*f*), and the reason of many of the rest is, *quia thesaurus regis est fundamentum belli et firmamentum pacis*. By stat. 14 Edw. 3, c. 1, escheats, wardships, customs, and profits arising out of the realm of England are said to be spent for the safeguard of the realm, more than the profits of the king's manors and lands. In the parliament roll, 6 Rich. II. (*g*), the Commons petition that the king will live of his own revenues: and that wards, marriages, releases, escheats, forfeitures, and other profits of the Crown, may be kept to be spent upon wars for defence of the kingdom; which shows that there was always a difference made between profits arising out of the king's manors and lands, and that profit which arose casually by the prerogative.

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The third way provided for defence of the kingdom, is by particular supplies of money for defence of the sea in time of danger. For supporting this charge our kings have not only had the grand customs of the mark and demi-mark upon wool, woolfels, and leather, and also prisage; but divers other things granted by Act of Parliament, *ex. gr.*, the petty customs which began 31 Edw. I., and were made perpetual by stat. 27 Edw. 3, c. 26, and likewise divers aids and subsidies, which are an increase of customs upon the staple commodities of wool, &c. That which was thus taken by his Majesty in the 11th year of his reign, when this writ issued forth, was 300,000*l.* and upwards. The aids and subsidies, and tonnage and poundage anciently granted upon particular occasions only, and afterwards to the kings and queens for life by Act of Parliament, and now taken by his Majesty, together with the new imposition, make up the aforesaid sum.

Supplies for
defence of
the sea.

(*f*) *The Case of Mines*, Plowd. 315 *et seq.*

(*g*) Rot. Parl. 6 Ric. 2, No. 42, vol. iii. p. 139.

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That the grant of custom is principally for protection of merchants at sea against the enemies of the realm, and pirates, appears by the *Case of Impositions* (*h*). That the aids and subsidies, and likewise tonnage and poundage, before they were granted for life, were not only for the protection of merchants, and the ordinary defence of the sea, but also for the defence thereof in times of extraordinary danger, and from invasion by enemies, appears by the *Parliament Rolls* (*i*). They were granted for the ordinary defence of the realm, principally of the sea; and that our kings might always have money in their hands to withstand invasion.

Bracton (*k*) says, *In rege necessaria sunt hæc duo, arma et leges quibus utrumque tempus bellorum et pacis recte possit gubernare*, and Glanville (*l*) observes, that *Regiam majestatem armis contra gentes sibi regnoque insurgentes oportet esse decoratam*. His Majesty, as lord of sea and land, is armed for the defence of both.

The service of the Cinque Ports, tonnage and poundage, and other duties, are the ordinary settled and known ways by the law appointed for defence of the seas: the way proposed in the writ by assessing and altering the property in the subject's goods without their consent is unusual and extraordinary. Now, *lex non facit salutem*; we are not to run to extraordinary, when ordinary means will serve. Acts done *extra ordinem*, in times of necessity, are not to be brought into example, for, if so, the same power that may once do them, might by the same rule always do them, and so might not at any time or in any thing be bound by rules of law.

As to altering the property in the subject's goods, though for the defence of the realm parliamentary assistance be necessary, the law ties no man, much less

(*h*) *Ante*, p. 141.

(*k*) *Lib. i. fo. 1.*

(*i*) *Rot. Parl. 1 Ric. 2. Part II.*

(*l*) *Lib. i. fo. i.*

Nos. 9 and 27.

the king, to impossibilities, and since the kingdom must be defended, the law having put this trust upon the king, when the ordinary supplies fail him, provides other means, viz.,—1st, aids and subsidies granted in parliament. It is clear that the law has provided this parliamentary way for supplying the king's wants, and has likewise put the power of using it into his Majesty's hands, for he may call parliaments when and so often as he pleases.

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That parliament is best qualified to make this supply, and best fitted for preserving that fundamental property which the subject has in his lands and goods (because each subject's vote is included in whatsoever there is done), may be proved both by reason and authority, for—

1. Parliament is by law appointed as the means of supply upon extraordinary occasions.

2. The aids demanded by former kings, and granted in parliament for defence in times of imminent danger, are very frequent. It is rare in a subject, and more in a prince, to ask and take that as a gift, which he may and ought to have of right.

The second way was by loans and benevolences demanded by our kings, with promise of repayment, for the ordinary and extraordinary defence of the realm; and that as well of all the subjects equally, as of some few.

The third way in which our kings met the charge of war was by anticipating their rents and revenues.

The law delights in certainty (*m*), and admitting that there is cause for raising money for defence of the realm, *non definitur in lege*, what will serve the turn. If his Majesty, as in the writ, may without parliament lay 20s. upon the defendant's goods, why not 20l. ? and so *ad infinitum*; whereby it would come to pass that, if the subject had anything at all, he would not be beholden to the law for it, but would be entirely dependent on the mercy of the king.

(*m*) *Ante*, p. 251.

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As to the second kind of proofs, viz., by authorities. If it be proved that his Majesty without parliament cannot tax his people for land forces for defence, for making and maintaining forts, for victuals for a defensive army, for maintenance of prisoners taken in a defensive war, for pledges given by foreign states for the keeping of peace,—the five supports of a defensive war,—it may then be asked whether this can be done at all?

If those holding by ancient demesne and burgage, which are but base tenure, cannot be taxed *nisi sur grand cause*, and have many privileges in consideration thereof; much less can tenants by knight's service and socage, who are free tenants, and have no privilege in support of the charge, be taxed. And if the king, without consent in parliament, cannot tax his tenants, nor apportion the fine according to his pleasure, when the tenant holds the land *ad exercitum*, for the defence of the kingdom, much less can he do it where there is no tenure for that purpose. That escuage cannot be set without parliament appears from the Magna Carta of King John (n).

As regards charging the subject for finding soldiers to go out of their respective counties for the defence of the realm, it may be admitted:—

1. That every man, after the Statute of Winchester (o), *secundum statum et facultates*, was to find all manner of arms as well for defence against foreigners, as for the peace of the realm.

2. That upon sudden coming of enemies, the king's subjects are compelled to travel out of their own counties, appears by stat. 1 Edw. 3, c. 5, and so for appeasing of any notable rebellion, when the king for the doing thereof goes in person, as appears by stats. 11 Hen. 4, c. 1, and c. 18.

3. That so long as they remain at home, and go not out of their counties, they are to have no wages; and

(n) Cap. 14, cited *post*, p. 323.

(o) 13 Edw. 1, st. 2, c. 6.

that the maritime shires, and those that border upon Scotland and Wales, were not to be at the king's charge, so long as they remained at home in their own counties for protecting them; but that they were in that case themselves to bear the charge against foreign invasion, as of making hue and cry, assisting the sheriff when he took the *posse comitatus*, and all other things which concerned the keeping of the peace.

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But that the subjects are taxable either for wages or victuals, or for finding soldiers out of their counties, though for defence of the kingdom, or are compellable to do it at their own charge, must be denied. The stat. 1 Edw. III. (*p*), says,—That in this case it shall be done, as usually had been done in times past, for the defence of the realm. Doubtless before Edward III.'s time, commissions issued out of chancery for that purpose. But it is as clear that whole armies, some of them of 30,000 at the least, over and above those who were summoned by their tenure, have been maintained at the king's charge, from the time that they departed out of their counties, during the whole time of their service; and that not only with promises of payment, but *ex thesauro regis*, out of the exchequer; and many times upon failure of payment for victuals, wages, and other things, upon suit for them in the exchequer, full payment has been made. So that *de facto* the king was usually at the charge of defensive war.

As to finding arms, &c., provisioning fortresses, and so forth:—

The stat. 14 Edw. 3, st. 1, c. 19, enacts,—That provision for the wars shall be made by merchants without commission or other power from the king, that the people may not be compelled to sell against their wills. That this was as well for defensive as offensive war, and was not *introductivum novæ legis*, but was so at common law, is clear.

Furnishing
victuals.

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In the next place,—When those who served with horse *ad vadia regis*, lost their horses in the service, the owners did not bear the loss, but were always paid for it by the king; and therefore when they first entered the service, the marshal or wardens of the marches, set down in a roll the horse of each man, and the mark and price of each horse, to the intent that the owner by this certificate might be assured of the full value being paid him, in case the horse was lost.

Victualling
of castles.

As to castles, the ancient forts and bulwarks for defence, the stat. 14 Edw. 3, c. 13, says,—That merchants without any commission or power from the king shall victual them, so that the people shall not be compelled to sell against their will. But even in the time of war, when the frontier towns and castles were besieged, and the borders invaded, the king did bear the charge.

Mainten-
ance of
prisoners,
&c.

And lastly, the charge and maintenance of prisoners taken in defensive wars, and likewise of hostages, and the carrying them to the several places of their abode, have been always borne by the kings of this realm.

If in all these particulars of soldiers, victuals, castles and forts, horses, prisoners, and pledges in case of a defensive war, our kings could not tax their subjects, but have borne the charge thereof themselves, it may be argued to be so for the defence of the realm in general. And where money has been borrowed by our kings for such defence, not only upon petition by their own pleasure, but likewise upon suit in an ordinary court of justice, they have been adjudged to repay it.

As to proofs derived from Acts of Parliament:—

Proofs de-
rived from
Acts of
Parliament.

The *ardua regni negotia* for which parliament is summoned, are principally *defensionem concernentia*; not the way or manner of defence, and advice therein, but the supplies and aids for such defence. That these aids cannot be raised without consent of parliament, may be strongly inferred from this, that the knights of the shires are to have *plenam et sufficientem auctoritatem pro se et*

comitate comitatûs prædicti ad faciendum et consentiendum to the things *in negotiis ante dictis*. If this might be done without consent of the commons, the above words in the writ would be needless. But that this cannot be done without their consent is clear from the words following: *Ita quod pro defectu potestatis hujusmodi dicta negotia infecta non remaneant quovismodo*. This is the constant form of all writs, and shows clearly that the commons, without their consent in parliament, are not chargeable to a defensive war.

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Then as to Statutes:—The charter of William I. contains after the words before cited (*q*) the following—*Ita quod nihil ab eis exigatur vel capiatur nisi servitium suum liberum quod de jure nobis facere debent et facere tenentur et concessum jure hæreditario in perpetuum per commune concilium totius regni nostri prædicti*. The entire passage shows that the king shall not exact, nor take any thing of any freeman, but what his tenure binds him unto. The words, by reason of their generality, extend to cases where the defence of the realm is concerned; that they do so in intent also may be shown; for the military services before mentioned for the defence of the realm, are by Bracton (*r*) and other writers (*s*), attributed to the Conqueror's institution. And the policy and provision of the Conqueror for the defence of the realm being by tenures, the words *quod nihil ab eis exigatur vel capiatur nisi servitium suum quod de jure nobis facere tenentur*, show plainly that the subject was not otherwise nor further to be charged for such defence than by tenure.

In the Magna Carta of King John (*t*) are these words: *Nullum scutagium vel auxilium ponatur in regno nostro nisi per commune concilium regni nostri nisi ad corpus nostrum redimendum*, and to knight the king's eldest son,

(*q*) *Ante*, p. 231.

4th ed. p. 46, *et seq.*

(*r*) Lib. ii. fo. 36.

(*t*) Cap. 14.

(*s*) See Wright on Tenures, chap. 2,

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and to marry his eldest daughter. As these words extend to the defence of the kingdom because all supplies for that purpose from the subject are only *in auxilium*, or *in subventionem expensorum* of the king, who is principally bound thereunto: so may their intent likewise be further gathered, first from this, that the word *auxilium* is joined with scutage, which is for the defence; and likewise from this, that particular satisfaction is made, by other parts of the statute, to those who had been disseised by Richard II. and King John, which were things done only for the increase of their revenue, without show of the common defence.

The next statutes to be noticed are *temp.* Edward I., viz. 25 Edw. 1, c. 5 & c. 6, and the statute *De Tallagio non concedendo*. Of these the former declares that aids, tasks and prises taken through the realm for the wars, shall not be brought into a custom by reason of any thing before done, be it by roll or any other precedent; and grants, that for no business thenceforth will the king take any such aids, tasks, and prises, but by the common assent of the realm and for the common profit thereof, saving the ancient aids and prises due and accustomed. And though by the copulative it is clear that there must be a consent and common profit concurring, and though the saving of the ancient prises and aids accustomed might well enough have been satisfied in the aid excepted in the charter of King John, and the prisage of wines and purveyance; yet to outweigh these and all other scruples, the statute *De Tallagio*, made afterwards for that purpose, is absolute and general: That no tallage or aid shall be taken by the king, nor that any of his officers shall take any corn, leather, cattle, or any other goods without the consent of the party.

The next statute to be noticed is the 14 Edw. 3, st. 2, c. 1, that the people shall not be compelled to make any aid, or to sustain any charge but in parliament. That this cannot be done for the defence of the realm appears

from the very words; for a great subsidy having been granted as well for the war on this side the sea, that is for defence, as for the French wars, it is declared that this shall not be drawn into example, and that out of parliament the king's subjects shall not be compelled to sustain any charge; and then it is further enacted that this subsidy and all the profits of wardships, escheats, and other profits of the realm shall be spent for defence of the realm, and the wars in Scotland and France, and not elsewhere. The words of the statute therefore taken together bear this sense, that the subsidies granted in parliament, and the wardships being a fruit of the tenures created for the defence of the realm, and other profits arising to the king by way of prerogative, are to be spent for the defence of the realm, and the king's other wars; but that no aid or charge for any of these can be laid upon the commons without consent in parliament. That the practice of King Edward III. was contrary to these provisions, and that they were not kept, appears by the Parliament Roll the year after (*u*), where the Commons show that their goods were seized, and their bodies imprisoned without any suit commenced against them.

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The next statutes to be cited are the 25 Edw. III., and 1 Rich. II., against loans and benevolences; on which an argument of this kind may be founded, *Ad ea quæ frequentius acciderint adparantur leges*. Loans and benevolences were in general for the defence of the realm, and for other purposes were few. The common grievances therefore being loans and benevolences for defence, against them these statutes were made, because not being within the words of any former statute, any king might with the more colour put them in practice. That loans for the defence were, after 25 Edw. III., counted unlawful, appears by Walsingham (*x*), who says that *anno* 44 Edw. III., the

(*u*) 15 Edw. 3, No. 9.

(*x*) Page 179.

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king *sinistro consilio magnas summas pecuniæ* of all sorts, *petiit, asserens quod in defensionem ecclesiæ et regni illas expenderet*, but that the people would not lend.

The next authority to be cited is direct in words, though it be not an Act of Parliament. In the second part of the Parliament Roll, 2 Ric. II. (y), the king being beset with enemies, to wit, France, Spain, and Scotland, who by land and sea invaded the realm; the privy council not willing, in a matter so much concerning the realm, to take the whole charge of it upon themselves, nor desiring so soon to call a parliament (a parliament but a little before having been dissolved), assembled a great council of the bishops, lords, and other great men and sages of the realm, who meeting and finding the absolute necessity of preparation for defence, and that the king wanted money to do it, resolved thus in the words of the Roll, *Pur conclusion final quilz ne poient cest mischiefe remedier sans charger les communs del royalme, quel charge ne poient de faire ne grant sans parliament*: and therefore the necessity being urgent, the great men lent money for the time, with advice presently to call a parliament, as well to provide for the repayment of their loan as for further supply.

Objections
answered.

It may be objected, that as the law has entrusted the manner of managing the defence wholly to his Majesty, so likewise must it be of aids and means, as the *causa sine quâ non*; and therefore his Majesty should not be dependent upon parliament for them.

The near relation between his Majesty and the parliament, that they are but one body, has been presented, and that his Majesty exercised the *summum imperium* there (z); but that the legislative power is not in his Majesty out of parliament, will be granted.

The subjects' interest being as nearly concerned in the defence, as his Majesty's is; as there is no cause to fear

(y) Nos. 3, 4, and 5.

(z) *Ante*, p. 310.

that they will not be willing to proportion the aid to the occasion; so neither can the law presume otherwise, which has so high an opinion of the judgment of this court (a), that it is unlawful for any man to conceive any dishonourable thing of it (b).

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Further, by law the king has as independent a power to make a foreign as to make a defensive war. And it will be granted, that in this case his Majesty has not power to tax the subject; for then it would follow, that as well for conquering the next adjacent realm as all Europe, the subject might be charged, and yet the land conquered be only his Majesty's. Nay, his Majesty having power to make an offensive, which for the most part causes a defensive war, by this means it would be in his Majesty's power to cause a defensive war, and to tax the subject for the maintenance of it.

Another objection stands thus: Parliament is a great body, and moves slowly; and the national cause may be lost before parliamentary supplies can come.

To this it may be answered that the same limitation of time applies to parliament as to tenants by knight's service *ad exercitum*, and for the Cinque Ports; forty days' warning is to be given to them as for parliament. And so it probably was for others who held by sea-service. And anciently the summonses *ad exercitum* to the ports, and for the parliament, went out together, or much about the same time, that the parliament might assess the escuage; and in case the tenures and other revenues were not able to maintain the war, that the parliament might provide for further supplies.

Tonnage and poundage, when first granted for life, was, that the kings might always have money ready upon such sudden occasions. In the Parliament Roll, 4 Ric. II. (c), the Commons desire payment of Edward III.'s debts, that they might be encouraged to lend the king in aid of the

(a) *i.e.* The parliament.

(b) Plowd. 398.

(c) No. 42.

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realm, if a sudden cause of necessity should fall out. The answer is, that it shall be done *selon le petition*. By which it appears that this objection was not then taken to be of weight, and the authorities that further answer it are great and full in point.

1. The first is that of the Parliament Roll, 2 Ric. II. before cited (*d*); the business of defence could not stay so long as for a parliamentary supply, yet it was agreed, that the commons without a parliament could not be charged; and therefore the same men that gave this judgment presently lent money for the required purpose.

2. The cause of making the stat. 31 Hen. 8, concerning proclamations, is expressed in these words: Considering that sudden causes and occasions fortune many times, which do require speedy remedies; and that by abiding for a parliament in the meantime great prejudice might ensue to the realm; therefore the king's proclamation is by that Act made equivalent to an Act of Parliament, but with a full exception of the subject's lands, goods, and chattels: which shows that as before that statute by the common law the king could not, even in cases of exigency, take or seize the subjects' goods, so they were careful still to preserve their rights.

The subjects' goods may indeed sometimes without their consent be taken from them; for property being both introduced and maintained by human laws, all things by the law of nature being common, there are therefore times when property ceases, and all things are again resolved into the common principles of nature. These times may be only *instanti*, and concern but some few, or may be longer in continuance, and larger in extent, and concern the whole kingdom, as in times of war, *quando agitur pro aris et focis flagrante bello*. And as in the former case, for that time, the law has no power nor can maintain any property, so in the other case it

loses this power for a longer time, and over all. *Tempus belli*, when property ceases, is not upon every intestine or defensive war, but only at such times when the course of justice is stopped, and the courts of justice are shut up (e). In such times of war not only his Majesty, but any man may take the goods of a subject within the realm, pull down his house, or burn his corn, to cut off victuals from the enemy, and do all other things that may conduce to the safety of the kingdom, without respect to any man's property, for the laws already established are silent in such times.

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Besides sudden and tumultuous war, which shuts the courts of justice, and brings his Majesty in person into the field, and wherein property ceases; the law takes notice of other times of war, as when his Majesty upon just cause, known unto himself, by proclamation declares war against a foreign state, and likewise the law takes notice of the effects thereof; that is, that no subject of such state is capable of suing in any of his Majesty's courts; it appears not, however, by the writ *sub judice* that war had been proclaimed against any prince or state. So that the question in the first place is, Whether in time of peace his Majesty may, without consent in parliament, alter the property of the subjects' goods for the defence of the realm?

In the next place, it is averred, that *salus regni periclitabatur*, and that was the cause of issuing the writ; and if by the demurrer this be confessed, it is so but in general; how or in what manner *periclitabatur*, *non constat*. The question then is this: In a time of peace, his Majesty's vigilance foresees a danger likely to ensue; the supplies for prevention of this danger will serve, if brought in seven months after within four days; may his Majesty in this case, without their consent in parliament, alter the property of the subjects' goods?

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Having done with the defence of the realm in general, it shall now be shown that this of the sea has no special peculiarity about it, but will fall within that of the defence in general: wherein, in the first place, an answer to some objections founded on authority and reason shall be given: and secondly, to some precedents concerning the use and practice.

Danegelt.

First as to Danegelt. It may be said that, the Danes infesting the realm, Ethelred, for resisting them, by his own authority laid this charge upon the subject, and made it annual. That, after the Conquest the Danes seldom infesting the coasts, the Conqueror took it not annually, but at such times only when *ab exteris gentibus bella vel opinionones bellorum fuerunt* (*f*). And that after Henry II.'s time the kingdom being altogether freed from Danish invasions, although Danegelt lost its name and use, it never being taken by hides of land as before, yet succeeding kings laid taxes upon their subjects for defence of the sea.

To this objection it may be answered, that Danegelt was granted in parliament. Mr. Camden (*g*) observes, that the Danes first infested the coasts, A.D. 800, and Danegelt first began in Ethelred's time, almost 200 years after the Danes' first invasion, for he began his reign A.D. 978. That provision was made for sea defence in the interim, and before Ethelred's time, appears by the many sea fights of Alfred and other kings. That this provision was usually made in parliament, is probable from Ingulphus (*h*), where, A.D. 833, which was thirty-three years after the Danes' first invasion, a deed to the abbot of Crowland is cited thus, *Coram pontificibus proceribus et majoribus totius Angliæ in civitate London, ubi omnes congregati sumus pro consilio capiendo contra Danicos piratas littora Angliæ assidue infestantes*. If King Ethel-

(*f*) See the Black Book of the Exchequer, lib. i. c. 11.

(*g*) Brit. ed. 1616, p. 76.

(*h*) Fo. 488.

red, by his own authority, might have imposed this, it is likely some of his predecessors, the case so necessarily requiring it, in above 200 years' space, would have done it before this time. But as appears by the laws of that king, in Mr. Lambert's Saxon Laws (i), *ex sapientium suorum consilio*, peace is made with the Danes, and a certain sum of money granted to the army. The Danes, by composition, were to send away the whole fleet, saving forty-five ships, which were to remain to defend the kingdom against other enemies, and the king was to maintain them at his charge. That Danegelt was paid to the Danes for this defence, many of our historians observe; and that at the same parliament (j) this was provided for, appears by the words of the law, *Si quis igitur posthac navalis apparatus in Angliâ prædam fecerit, hic nobis auxilium ferat exercitus, nosque ei quamdiu in fide manserit quæ ad comitatum suppetentem paramus omnia*. If this was not the Danegelt, it is at least clear, that in King Ethelred's time provision *contra navales apparatus* was made by parliament. If the Danegelt in such time of great danger was not imposed without parliament, it must strongly make against those that shall object it.

That, the Danes having quitted the realm, the Danegelt was released by Edward the Confessor, appears from Ingulphus and our later historians (k). Ingulphus was brought up in England in the Confessor's days, and therefore knew what he wrote; he afterwards went over into Normandy, and was the Conqueror's secretary, came over with him to the conquest and at his own charge maintained twelve horses:—he was so great at the court, that, as himself writes (l), *quos voluit humiliavit, quos voluit exaltavit*; and we read that a charter of the Conqueror to the Abbey of Crowland was made, *ad petitionem fami-*

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(i) Fo. 58.

(j) 9 Rep. Pref. xiv.

(k) Ingulph. fo. 520; Hoveden,
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(l) Fo. 514.

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liaris mei Ingulphi, who therefore, in all likelihood, would not report this partially against the king.

That we are not to put out our fires upon the ringing of the curfew bell, we have no other law but disuse, and the testimony of historians that Henry I. released it (*m*).

That many things were done *de facto*, to the infringing of the liberty of the subject both in William the Conqueror's time, and in the times of Henry I. and Henry II., is clear; and if Danegelt were not released before, yet that King Stephen released it, appears from history (*n*), and as all our historians agree that after Henry II.'s time, in whose reign the Black Book was compiled, it was never paid; so it may be collected out of the Red Book, for all or most of the aids and escuages in Henry II.'s time, and King John's time, are there mentioned. In 8 Henry II., it is said, *quod Danegeldum assessum fuit*; but after that, there is no more mention of it.

In the last place, if succeeding kings, *mutato nomine* only, have in lieu thereof laid other taxes upon the subject, such taxes must hold proportion with that of Danegelt, *i.e.*, must have been equally set upon all the inland towns throughout the kingdom, as that was, and upon every hide of land.

It may further be objected, that at common law, before the Statute of Winchester, the king might compel his subjects to find arms for the defence of the kingdom; and therefore, by the same reason, he might charge them to find ships for the defence of the sea.

To which it may be answered, 1. That his Majesty by tonnage and poundage, and the other duties at common law, has a particular supply for the shipping, but has nothing in particular for arms; and therefore that may with more reason be laid upon the subject than the other. And yet for one of the principal things in the Statute of

(*m*) Spelm. Gloss. p. 161.

den, fo. 276; Spelm. Gloss. p.

(*n*) Huntingdon, fo. 221; Hove- 162.

Winchester, *i.e.*, for watching and warding, the king before that statute had a particular and certain farm or sum of money of each county for the doing of it, which, after that statute, the county was discharged of, because thereby the counties took the charge of doing it upon themselves.

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2. Besides, each subject, *secundum statum et facultates*, is chargeable for shipping, as has been before proved; and therefore if he be chargeable both in money and kind too, the charge is double in the one, and but single in the other. Neither could it hold proportion with these cases of watching and warding, where the counties were discharged of the money when they took the thing in kind upon themselves. And therefore this objection cannot be made, unless his Majesty first quit all the before-mentioned duties laid upon merchandize.

3. Further, in the providing of arms there is only *mutatio speciei*, a changing of money into arms; which remain the subject's still in property, and are in his own custody; he may sell them, or employ them for his own use; but in this matter of shipping there is *ablatio rei*, in respect of the victuals and mariners' wages.

4. Arms are not only for defence against foreigners, but for watching and warding, upon hue and cry, or otherwise to keep the peace within the realm, and for the execution of justice, by assisting the sheriff when he shall have occasion to use the *posse comitatus*, and otherwise, all which do fail in the other. And as the use of arms is more general, so they are for the more immediate defence of that element, wherein we have our usual and certain livelihood. And yet the ordering of these, for three hundred years and upwards, was by authority of parliament.

Lastly, in respect of the victuals and mariners' wages to be found for twenty-six weeks, the case in question, as I conceive, cannot be compared to that of arms, but rather to that of taxing the country for finding of soldiers to go out of their counties.

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The next objection is, that it is in his Majesty's power, for the safety of the realm, to shut up the ports and havens of the kingdom, and thereby to make a general stoppage of all manner of foreign trade; and therefore, as his Majesty may anticipate gain, by barring men from the exercise of their callings, so by the same reason may he take something away.

To which it may be answered, 1. That the law intrusts the king only with that, which being done is most to his own loss, as, in respect of the customs and other duties, this of prohibiting foreign trade would be. 2. That this cannot be done but in time of war, and imminent danger, and that therefore this objection will not be seasonable till the other be put in execution.

Precedents
examined.

As to precedents, it may be answered that most or all of them are for charging the sea-towns and havens which have ships, and many great privileges, and are enfranchised for that purpose, as declared in the Parliament Roll of 13 Edw. III. below cited (*o*). These that are to find ships, besides the main subscription for wrecks and benefit of fishing, are discharged of arrays and defence at land. But any towns not maritime ought not to be charged, which is the very case of the defendant. And it appears that the inland counties had not so much as *de facto* been usually charged for ships. By Rot. Fra. 21 Edw. III. (*p*), those towns *quæ naves non habent, et quæ aliis naves habentibus contributoria non existunt* should be discharged; and although some towns being members of great seaports are contributory to shipping, other inland towns are not contributory (*q*).

The charges laid upon the people for the custody of the sea, were the principal grievances that occasioned the making of the statute of 25 Edw. I., and the statute *De Tallagio non concedendo*.

(*o*) No. 11, Rot. Parl. vol. ii. p. 105.

(*q*) Rot. Parl. 2 Ric. 2, Part II., No. 42.

(*p*) M. 17.

By the former the king declares that he had a desire to redress the grievances caused to the people in his name, and instances what they were, *veluti de rebus captis in ecclesiis, et de aliis rebus captis et asportatis tam de clericis quam de laicis, sive pro custodiâ maris vel alio modo quocunque*; wherein is an acknowledgment that it is a grievance, and to be redressed, to lay any tax upon the subject for the defence of the sea. Commissioners are there named throughout all England to inquire of these grievances. 1st. Whether the things were taken without warrant; and if so, then the party that took the goods is to make satisfaction, and further to be punished for the trespass. 2ndly. If there were no warrant allowed, then the officer was to make satisfaction. 3rdly. If all were done according to and in pursuance of the warrant, and no more; then what upon certificate thereof is. The king thereby promises that whatsoever things were taken from the people by any command of his for the custody of the sea, he will make reasonable satisfaction to the party for such things.

That the same grievance caused the making of the statute *De Tallagio non concedendo* has before been shown (r).

The next authority which I shall present is anno 23 Edw. I. (s). There the king commanded thirty galleys to be made by several great towns; every galley was to have 120 men a-piece; these were *pro defensione regni et securitate maris*. The cases are many in the Exchequer, where the money for making these galleys was recovered against the king. The king had promised payment to those that made them. But in case the king might have commanded the making of them, at the charge of the towns, his promise was but *nudum pactum*, and so the payment rested only upon the king's grace and good pleasure. Nevertheless, upon suit in his own time, and in

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(r) *Ante*, p. 324.

(s) Rot. 77.

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the times of Edward II. and Edward III., the monies for making these galleys were received by several towns.

The next authority to be presented is the Parliament Roll, 13 Edw. III. (*t*). The causes of calling the parliament are declared to be these: 1st, the keeping of the peace; 2ndly, the defence of the Marches; 3rdly, the safeguard of the sea, that the enemy might not enter the realm to destroy it. These were the three points for the Commons to advise on, which are entered upon the roll. By the articles themselves, propounded on the king's part, it appears, that the Commons are not chargeable to the guarding of the sea; and they pray, that this advice of theirs may not be prejudicial to them to bind them thereunto, and that there are ships enough in England to do it, if the people were willing. The Commons afterwards in debating of these articles, when they came to this of the sea, are afraid that if they should debate it, it might imply that they are chargeable to do it; and therefore they protest against giving any advice therein, as a thing whereof they have no cognisance; and further declare, that the Cinque Ports, and other great towns, that have franchises, are bound thereunto, that they should do it. And therefore the merchants, masters of ships, and mariners, throughout England, are summoned to be at the next parliament for advice about shipping.

The next authority is the Parliament Roll, 22 Edw. III. (*u*), by which it appears that the Commons having formerly granted the king divers aids and subsidies upon wool, woolfels, and leather, and otherwise, for the guarding of the seas, now grew weary of it, and desired that the king himself from thenceforth should bear the whole burthen, and charged him with his promise to that purpose.

In this petition the Lords joined; hence it appears,

that the whole kingdom, at this time, was so far from thinking that the king could charge them, without their consent, to the guarding of the sea, that they allege the king himself ought to bear the whole charge. Neither does the king deny his promise, nor wholly refuse the petition; for though he says, it should be done as hath been done before, yet it is with a qualification, because the sea cannot be better kept than he hath kept it, by reason of his being so often at sea in person, in going to and returning from France, and diverting the enemy by his wars in France. If the king had given his absolute denial, yet here is the judgment of both houses of parliament express in point.

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The next authority is the Parliament Roll, 2 Ric. II. (v), before cited, where the great council of the kingdom resolve, that the commons are not chargeable to the defence of the realm without parliament; which extends to this particular of the sea.

The next proof is drawn from the practice of former kings in their frequent demands of aids from parliament for the defence of the sea, as well before the statutes of tonnage and poundage, as since; moneys borrowed by former kings for ships and defence at sea, and indentures of retainer for that purpose at the king's charge; and not only so, but upon suit allowance in the Exchequer for victuals, mariners' wages, anchors, prisoners taken in fights *pro defensione*, and other things necessary for shipping when for defence of the realm. Whereupon the same argument may be made in this particular for the sea, as was before for the defence in general.

Admitting that *nullum tempus occurrit regi*; nevertheless, the non-user by our kings of their asserted prerogative of levying money for defence of the realm may be relied upon in interpretation of the statutes against aids and tallages; and of the complaints of the parliament

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temp. Edward I. and Edward VI. that those statutes had not been kept.

The non-claims, therefore, of so many kings and queens may be presented as so many *le veuts* and confessions, that without assent in parliament they could not have laid the like sess upon any of their subjects, as is now laid upon this defendant.

Judgment.
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The following opinions (*x*) respectively in favour of, and adverse to, Mr. Hampden were delivered by the Court. Sir George Croke (*xx*) observed:—This is a case of great weight; for, on the one side, it concerns the king's prerogative; and, on the other, it concerns the king's subjects, their liberties, persons, and estates: and, in my opinion, judgment ought to be given for the defendant for the following reasons:—

1st. That the command by this writ of 4 August, 11 Car. to have ships at the charge of the inhabitants of the county, is illegal and contrary to the common law, not being by authority of parliament. 2ndly. That if at the common law it had been lawful, yet this writ is illegal, being expressly contrary to divers statutes prohibiting a general charge to be laid upon the commons without consent in parliament. 3rdly. That it is not to be maintained by any prerogative, nor allegation of necessity or danger. 4thly. Admitting it were legal to lay such a charge upon maritime ports, yet to charge any inland county, as the county of Bucks, for making ships, and furnishing them with mariners, &c., is illegal, and not warranted by any precedent. 5thly. I shall examine the precedents and records cited to warrant this writ.

I have examined this particular writ, and the several parts thereof, and do conceive it is illegal, and not sufficient to ground this charge upon the defendant.

1st. The motives of this writ are not sufficient to cause

(*x*) For an analysis of the remaining judgments, see 2 Hall. Const. Hist. Eng. 22.

(*xx*) As to whom see Foss, Judges of England, vi. p. 130.

such a writ to be sent forth. 2ndly. The command of the writ to prepare a ship at the charge of the inhabitants, which mentions victuals and men, is against the common law and statutes of this kingdom. 3rdly. To lay a charge of finding victuals and wages of soldiers and mariners, is illegal, and contrary to the common law and divers statutes. 4thly. The power of assessment given to the sheriff alone, and to distrain for this, is illegal, and not warranted by any precedent. 5thly. The power of imprisoning is illegal, contrary to divers statutes, and not warranted by precedents. 6thly. The preclose of the writ, and the practice of it, is contrary to itself, and *oppositum in objecto*. 7thly. If this writ were legal, yet the manner of the assessment by the sheriff, as it is certified, is not warranted by it; consequently the sum cannot be demanded of the defendant by virtue of this writ. 8thly. The *Certiorari* and *Sci. Fa.* issued not legally, and consequently no judgment can be given against the defendant thereupon.

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That this writ is against the common law, my reasons are:—

1. Because this is the first writ since the Conquest sent to any inland county to prepare a ship with men and ammunition, for aught that appears by any record shown. And where there was never any precedent, the law is conceived not to allow any such writ. Sir Edward Coke, in his "Comment upon Littleton" (y), says that where there is no example, it is a great intendment the laws will not bear it. So I conceive, there never having been a precedent of any such writ, that it is against the common law.

2. Because the common law of England gives freedom to subjects in respect of their persons, and gives them a property in their goods and estates; so that without their consent, or implicitly by an ordinance which they consented unto in parliament, it cannot be taken from them, nor their estates be charged; and for this purpose

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the law distinguishes between bondmen, whose estates are at their lords' will and disposition, and freemen, whose property none may invade, but by their own consent, which is proved by the authorities (z).

That the law is so, appears by Fortescue (a), who says, that the King of England cannot alter the laws of England at his pleasure, for *principatu nedum regali sed et politico ipse populo suo dominatur*. If his power were royal only, then he might change the laws, *tallagia quoque et cætera onera eis imponere ipsis inconsultis*; but adds that the King of England *sine subditorum assensu leges mutare non potest, nec subjectum populum renitentem onerare impositionibus peregrinis*. And he compares the king and subjects of England to the head and body natural: *Ut non potest corpus physicum nervos suos commutare neque membris suis proprias vires et propria sanguinis alimenta denegare sua, nec rex qui caput corporis politici est mutare potest leges corporis illius, nec ejusdem populi substantias proprias subtrahere, reclamantibus eis aut invitis* (b). And, afterwards (c), he says: *Rex Angliæ neque per se nec ministros suos tallagia, subsidia, aut quævis onera alia imponit, legiis suis, aut leges eorum mutat, vel novas condit, sine concessione vel assensu totius regni sui in parlamento suo expresso*. Which words seem so general, that in no case can he do it.

So it appears by the case *infra* (d), that the king's grant, which tends to the charge and prejudice of his people in general, is not good, unless it be by parliament. But it is agreed there, that grants of tolls, of fairs, of pontage, pickage, murage, ferrying, or such like, which are for the profit, good, and ease of the people, and profit of them that will take benefit thereof, and not compulsory on any to pay, but on them that will take the benefit, and being

(z) *Fraunces's Case*, 8 Rep. 92, a.
The Charter of Will. 1, cited *ante*,
p. 231; Magna Carta of King John,
cap. 29, cited *ante*, p. 232.

(a) De Land. Leg. Ang. cap. 9.

(b) Cap. 13.

(c) Cap. 36, fo. 84.

(d) Year Bk. 13 Hen. 4, fo. 14.

very small and reasonable sums, the law gives allowance to them; but if they were great sums, tending to the charge of the people, the law would judge them void (e).

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In *Darcy's Case* (f), it is said that every grant of the king has this consideration in it, tacit or express, *quod patria, per donationes illius, magis solito non oneretur*. And as by grant the king cannot charge his people, so neither can he by writ lay any charge upon them, but by their consent, or where they have apparent benefit thereby. And this is the reason of the writ in the register (g)—where by breach of sea-walls an inundation happens, the king, who is *pater patriæ*, sends out his commission to inquire by whose default such breach happened, and to cause all having lands or commons to be contributory to the making up of the walls; such charge cannot, however, be laid upon a county or town in general, but upon particular persons who have or may have loss or benefit thereby; and this is done by inquiry of a jury, before the sheriffs, or commissioners appointed. So it is at this day, upon commissioners of sewers (h). But in this case there is a general charge through the whole kingdom, which the law does not permit, without common consent in parliament.

But it has been alleged that this charge has been imposed for the public safety and defence of the kingdom; and may not this be done when every one has advantage by it? To this I say, when there is imminent danger, there must be defence made by every man (when the king shall command) with his person: in such a case every man is bound *per se et sua* to defend the kingdom. And I think no man will be so unwise as not *exponere se et sua* for the defence of the kingdom when there is danger, for otherwise, he is in danger to look to *se et sua*; but to lay a charge in general upon the kingdom, either for

(e) 5 Rep. 63.

(f) 11 Rep. 86, citing Fitzh. Nat. Brev. fo. 222.

(g) Reg. Brev. 127; Fitzh. Nat. Brev. 113.

(h) 10 Rep. 142.

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making or preparing ships, or paying money in lieu thereof, is not to be done but by parliament.

To prove, further, that no man may have his goods taken from him but by his consent:—In an action of trespass, by William Heyborne, against William Keylowe, for entering his house, and breaking his chest, and taking away 70*l.* in money, the defendant pleaded not guilty; the jury found a special verdict, that the Scots having entered the bishopric of Durham with an army, and made great burning and spoils, the commonalty of Durham, whereof the plaintiff was one, met together, and agreed to send some to compound with the Scots for money to depart, and were all sworn to perform what composition should be made, and to perform what ordinance they should make in that behalf; and thereupon they compounded with the Scots for 1600 marks. And since that was to be paid immediately, they all consented that William Keylowe, the defendant, and others, should go into every man's house, to search what ready money was there, and to take it for the making up of that sum; and that it should be repaid by the commonalty of Durham; and thereupon the defendant entered into the plaintiff's house, and broke open his chest, and took the 70*l.*, which was paid accordingly towards the fine. The jury was asked whether the plaintiff was present, and consented to the taking of the money? They said no: whereupon the plaintiff had judgment to recover the said 70*l.* and damages, for otherwise he had no remedy for his money; and the defendant was committed in execution for that sum. And thereupon the defendant, Keylowe, brought a writ of error in the King's Bench, where the judgment was reversed for these reasons: 1st, because the plaintiff had his sufficient remedy against the commonalty of Durham for his money: 2ndly, because he himself had agreed to this ordinance, and was sworn to perform it; and the defendant did nothing but what the plaintiff had assented to by his oath, and was accounted to have done

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nothing but by his consent, and as servant unto him; therefore he was no trespasser: and the judgment given in Durham was reversed, because the plaintiff had assented to the ordinance, though afterwards he was unwilling; having once consented, his goods were lawfully taken. By which it appears, that if he had not expressly consented, such an ordinance would not have been good to bind him; although this was in a case of great danger, and for defence (i).

The Parliament Roll *infra* (k) proves this directly, and shows what the law was then conceived to be, and proves that this charge without an Act of Parliament is illegal.

If this writ were allowed, great inconveniences would ensue, which the law will always avoid.

1. If any such charge may be laid upon the counties by writ, without assent in parliament, then no man knows what his charge may be; for he may be charged as often as the king pleases, and with making of as many ships, and of such burthens, and with such charge of ammunition, men and victuals, as shall be set down. Wherein I doubt not, but if the law were so, the king, being a very pious and just king, would use his power very moderately; but judges are not to look to present times only, but also to all future times, for what may follow upon their judgments. That this inconvenience may be, appears by the Danegelt (first appointed in times of necessity), which often changed, and still increased; for A.D. 991, when it began, it was but 10,000*l.*; in 994 it was increased to 16,000*l.*; in 1002, to 24,000*l.*; in 1007, to 36,000*l.*; and in 1012, to 48,000*l.* So if this writ be well awarded, it may be at pleasure what bounds it shall have. Also, there never used to be granted in parliament but one single subsidy and two fifteenths, until 31 Eliz., and then a double subsidy and four fifteenths were granted; Sir Walter Mildmay, Chancellor of the Exchequer, moving

(i) Mich. T., 14 Edw. 2, Rot. 60.

(k) 2 Ric. 2, *ante*, p. 326.

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for it, and saying, "his heart did quake to move it, not knowing the inconvenience that should grow upon it;" he showed, however, great reasons for moving it, it being about the time of the Spanish invasion, and so it was granted. Afterwards, 35 Eliz., treble subsidies and fifteenths were granted. And 43 Eliz., four subsidies and eight fifteenths were granted; and yet these were not accounted grievous, because granted in parliament, and because convenient times and means were appointed for levying them. Tonnage and poundage were granted to this end in 13 Ric. II., and have continued ever since by several grants until this king's time, wherein it was unhappily questioned in parliament; but the end thereof was, that our kings might have money in their purses against times of need, for extraordinary occasions, especially for the defence of the realm, and guarding of the sea, as is especially declared by stat. 1 Jac. and former statutes, and for other necessary uses, as the king pleased.

But it is said, that tonnage and poundage is not now granted to the king, and therefore the king is enforced to these extraordinary courses.

Though it be not granted, yet I think it is taken; and I doubt not but for the same purpose employed for which it was first granted, which was, for the defence of the kingdom. Therefore, in case of danger, every subject, for the defence of the kingdom, is bound *legiantie debito*, as some records say, and *legiantie sue vinculo astrictus*, as others speak, *se et sua totis viribus et potestate exponere*, &c. And in such a case the king may demand the persons of his subjects, and arrest their ships to wait on his to defend the seas; yet with this also, when they go out of their counties, to be at the king's charge; but to command his subjects by writ, to build new ships, or to prepare ships at their charge, or to lay a common charge on subjects in general for matter of defence, is not warrantable by the common law.

2. Another inconvenience is, that it is left in the power of the sheriff to charge any man's estate at his pleasure, taxing some, and sparing others, as his affections lead him ; and sometimes, by colour thereof, levying more than he need, and enriching himself ; which power the law never allows him, though it were in lesser matters, as to make an assessment for breach of sea-walls ; but he must do it by a jury, not by himself alone. So for these reasons, I conclude, this writ is against the common law, and illegal.

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I conceive, if the common law were doubtful, whether such a charge might be imposed by writ ; yet now it is made clear by divers express statutes (*l*), that the king is not to lay any charge upon his subjects, but by their consent in parliament ; and there is no doubt but the king in parliament may bind himself and his successors, every king by oath being bound to perform the statutes of the realm.

An Act of Parliament (*m*), as I count it, in the very point, is in these words : “ For that of late divers commissions were made to divers cities and boroughs within the realm, to make barges and barringers, without assent of parliament, and otherwise than hath been done before these ; however the Commons do pray the king that these commissions may be repealed, and that they may not be of any force or effect.” To which it is answered, “ That the king willeth that the said commissions be repealed ; ” which is an absolute and perfect statute.

But then there are added these words : “ But for the great necessity he hath of such vessels for the defence of the realm in case that the war shall happen, he will treat with his Lords of this matter, and afterwards will shòw it to the Commons to have their counsel and advice in this

(*l*) See particularly 25 Edw. 1, c. 5 & c. 6 ; the statute De Tallagio non concedendo ; 14 Edw. 3, st. 2 ;

25 Edw. 3, st. 5, c. 8, affirmed by 4 Hen. 4, c. 13.

(*m*) Rot. Parl. 21 Hen. 4, No. 22.

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point." So by the record it appears that the Commons did conceive that no cities, boroughs, nor towns, without consent in parliament, were to be charged with the making of such vessels; to which the king agrees. And from that day until the making of these writs, in no age, although the kingdom has been many times in danger of invasion, and has been invaded, do there appear any records of writs directed to towns or cities, at their charges to make or prepare any ships or vessels whatsoever.

By 1 Ric. 2, c. 1, it is expressly provided that the subject shall not be charged by way of benevolence, which is in nature of a free gift, nor such like charge: that is, no charge of money shall be laid upon the subject upon any pretence whatsoever, be it for defence in time of danger or guarding of the sea.

The last and concluding statute is the Petition of Right, which is a full and perfect statute, showing in this point the liberty of the kingdom prayed and allowed; which was not done without the advice of the judges, whereof I was one, whose opinions were then demanded, and resolved that the same did not give any new liberty, but declared that the subject should not be compelled to be contributory to any tax, tallage, or aid, or any like charge not set by parliament. I conclude that these writs to lay such a charge are against the law, and so the assessment by colour thereof is unlawful.

Now whereas precedent arguments have been that the kingdom being in danger therefore these writs went forth for the making of ships, because there could not be so suddenly any parliament called, and the parliament is a slow body, and the kingdom may be lost whilst there is a consultation, and the danger is conceived to be very great, for the writ dated 4th August mentions, that the pirates provided a great navy to infest the kingdom, and it is fit with speed to provide a remedy: and the writ of *Mittimus* mentions that *salus reipublicæ periclitabatur*: and we must

believe these suggestions to be true, for the king's certificate by this writ is *recordum superlativum*. And the defendant also by his demurrer has confessed all the suggestions in the writ to be true; therefore it must be concluded the kingdom was in great danger, and present remedy must be had by making of these ships, and must be commanded by these writs, without staying for a parliament; and it may be if a parliament were called, they would not yield to the going forth of such writs, although the kingdom was never so much in danger. And this charge in respect of making the defence is not within the intention of these statutes; and if it had been expressly mentioned within a statute, that such a charge should not be imposed, it had been a void statute, and contrary to law, that the kingdom should not be defended.

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To these objections I answer, 1, The matter now in question is upon the writ dated 4th August:—whether that be legal or not; and the suggestions therein be sufficient or not; for the writ of *Mittimus*, mentioning that *salus reipublicæ periclitabatur* at the day of the issuing of the writ, 4th August, which is a year and a half after the first writ, does not help it.

2. The suggestions are not absolute, that any such danger existed, or that such navy was prepared by pirates; the writ only mentions *quia datum nobis intelligi*, that the pirates had done such mischief.

3. If such suggestions had been absolutely set down, yet we are not always bound absolutely to believe them; because many times untrue suggestions are put into writs and patents; and yet it does not lie upon the king's conscience, neither does the law impute it to the king: for the law always conceives honourably of the king, that he cannot, and will not, signify any untruth under the Great Seal; but that he is abused therein, and the law imputes it to them that so misinformed the king, and thrust such suggestions into the writ or patent. And

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therefore all patents grounded upon untrue suggestions are accounted void (*n*).

4. The demurrer confesses nothing but that which is legally and well set down; if it be illegal the demurrer confesses it not, but is well offered for that cause.

5. If the kingdom were in danger, yet a danger must not be laid in general upon subjects, without their consent in parliament: for if the danger is near, provision must be made by men's persons, and the present ships of the kingdom, which the king may command from all parts of the kingdom, as need shall require; but he cannot command money out of men's purses, by distraining their goods or imprisoning their persons. But if the danger be further off, by reason of foreign combinations (as it is conceived it may be here), provision must be made of ships by all the kingdom for defence; then, as Philip Communes says (*o*), that cloud is seen afar off, before the tempest falls, especially by a foreign war; and such invasions cannot happen so soon but the king may call his sages together, and by consent make provision for such defence.

So I say here, if there be time to make ships, or prepare ships at the charge of the counties, then is there time enough for his Majesty, if he pleases to call his parliament to charge his commons, by consent in parliament, and to have a subsidiary aid, as always has been done in such cases. And they are not so long coming or meeting, but they will make provision for defence, it being for all their safeties: for it appears by Coke (*p*), that King Alfred made a law, that a parliament should be held twice every year, and oftener, if need required, in times of peace; so it was then conceived, that it was necessary to have parliaments to redress inconveniences. Also by stat. 4 Edw. 3, c. 14, a parliament shall be held once

(*n*) *Ante*, p. 233 *et seq.*
(*o*) Fo. 179.

(*p*) 9 Rep. Pref. 1.

every year, and oftener if need be. And by stat. 36 Edw. 3, c. 10, it is enacted, for the redress of mischiefs and grievances that daily happen, that a parliament shall be holden every year. In the parliament held in the third year of his Majesty's reign five subsidies were granted, two of them to be paid within a few days after the session of parliament ended; and therefore this case might have been provided for by parliament within the time between the teste of the writ and that prefixed for ships to be prepared and sent.

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And whereas it is objected, that perhaps the parliament would not have consented, and so the kingdom might have been lost. It may be answered, that it is not to be presumed that the parliament would deny to do that which is fit for the safety of the kingdom, their own estates and lives being in danger, if the kingdom were not sufficiently defended; for it is a rule, *nihil iniquum est præsumentum in lege*. So of the high court of parliament, that they would not deny that which is fitting. But I confess, I think that if it had been moved in parliament, they would not have consented to these writs, such never having been awarded since the Conquest, or, if they had consented, they would not have left it to the sheriff to tax the people how he would.

To that which has been said, that this charge is not within the statute, and that a statute to prohibit such a charge for defence were void. I answer it is true, that if a statute enacted that the king should not defend the kingdom, it would be void, being against law and reason. But a statute that money shall not be charged or levied, nor that men shall be charged to make or prepare ships at their own charge, without common consent in parliament, I conceive were a good law, and agreeable to law and reason. And the king may restrain himself from laying such a charge, but by consent in parliament. And the king would not assent to, or suffer any such charge, if he were truly informed that the imposing of it is against

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law. And therefore the principal and only fault in the charging of his subjects by these writs, if they be unlawful, as I conceive they are, is in those that devised them, and informed the king that they were lawful, and such as his progenitors had from time to time used to send forth; and in his judges who have affirmed them to be lawful: therefore upon this point I conclude, that the charge, by this writ, is illegal.

Whereas it has been much urged that the king is warranted by his prerogative in sending forth such writs for defence of the kingdom in time of danger. To this I answer, That I do not conceive there is any such prerogative; if there were, I should not offer to speak against it: for it is part of our oaths, as judges, to maintain the king's prerogative to the best of our skill, and not to suffer the same to be diminished. But if it be as I have argued, against the common law, and against many statutes, that the subject should be forced to sustain, or contribute to any charge, without his special consent, or his assent in parliament, then there is no such prerogative; for whatsoever is done to the hurt or wrong of the subject, and against the laws of the land, is accounted not done by the king, but on some untrue and unjust information. This appears by the authorities (*q*).

So I conclude that there is not any prerogative to award writs to command men to sustain this charge; and to be distrained and imprisoned for non-payment thereof; —also that this is not an act of royal power; for if it be illegal to impose such a charge, then it is not accounted as a matter of royal power, but as done upon an untrue suggestion, and as a wrong; and wrong is not imputed to the king, for he can do no wrong; but it is imputed to them that advised him to this course.

Royal power is to be used only in cases of necessity,

(*q*) Bracton, lib. iii. fo. 107; 11 Rep. 72, 86; Plowd. 246, 247, 487; Doct. & Stud. c. 5.

and imminent danger, when ordinary courses will not avail; for it is a rule, *Non occurrendum est ad extraordinaria, quando fieri potest per ordinaria*; as in cases of rebellion, sudden invasion, &c., where martial law may be used. But in a time of peace, and no extreme necessity, legal courses must be used, and not royal power. Therefore, the stat. 31 Hen. 8, c. 8, concerning proclamations (r) took care that no man's life, lands or goods, should be taken or prejudiced. So Bracton (s) says, *Regis corona est facere justitiam et judicium, et tenere pacem, sine quibus corona consistere non potest, nec teneri*; which being so, the king cannot take away men's goods, or charge them without their consent, by any prerogative or royal power.

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Also there can be no such necessity conceived, that may cause these writs to be awarded to all counties of England, to prepare ships at such a charge, and with such men and ammunition, without consent in parliament; for the laws have provided means for defence in times of danger, without taking this course. The king has power to command all, or any persons of his kingdom, to attend with arms to defend the coasts, or other parts of the kingdom; and also by his officers, to arrest any ships of merchants, and others, to go with his navy, to any parts of his kingdom, for defence thereof; and to attend those to whom he has appointed the guard of the seas, or the sea-coasts, at such times and places as they should appoint. And this has been always conceived to be sufficient for defence against any prince whatsoever; even in times when the navy of England was not so strong as now.

Ex. gr. A.D. 1588, on the invasion by the navy, termed The Invincible Navy, which was foreseen long before, this course of preparing ships by every county of the

(r) *Ante*, p. 328. This statute s. 5.
was repealed by 1 Edw. 6, c. 12, (s) Lib. ii. c. 24, fo. 55.

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kingdom was not appointed: and in times when there appeared great danger of invasion, there never went any such writ into any of the counties of England, to provide ships; but the navy of England, and army of England, were always accounted sufficient for the defence of the kingdom.

So I conclude that this course cannot be taken by any prerogative or royal power, nor on any allegation of necessity or danger.

For the fourth point (t), I conceive, that if it were legal to lay such charge upon maritime parts; yet to charge any inland county with the making of ships, and furnishing them with mariners and soldiers, is not legal; for it commands an unreasonable and impossible thing to be done: and a writ commanding such a thing as is unreasonable and impossible for the parties themselves to perform, without help of other counties, is illegal: *Lex non cogit ad impossibilia*. If a feoffment be made on condition to be void, if the feoffee do not a thing which is impossible, the feoffment is good, and the condition void: for it was the fault of the feoffor to annex such a condition. If an arbitrator award that one shall enter into bond, with A. as his surety, to pay a sum of money, or to do any other act, it is void, as to the finding of a surety at the least; for it is not in his power to compel A. to be his surety; therefore the law accounts the award unreasonable, and void (u).

So this writ commanding the sheriff and inhabitants of an inland county to find a ship with masters and mariners, is illegal, for there are not in such county any shipwrights having skill to make ships, nor any masters or mariners, for the inhabitants are conversant about matters of husbandry, and are trained up by skill of arms to defend the country, but are not conversant with sea affairs; and they are not bound to seek out of the county

*(t) *Ante*, p. 338.

(u) Year Bk. 17 Edw. 4, fo. 5.

for such men ; and perhaps if they did, they could not tell where to find them. Therefore I conclude, that this writ is not legal, nor warranted by precedent.

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Fifthly. A multitude of precedents have been cited to warrant these writs ; and to show that the king has done nothing but what his progenitors have done, and that he does now but *more majorum*, and that which always in ancient times has been done and allowed, and therefore ought to be done.

But I answer, that if there were any such precedent to prove this writ to be usual, yet it were not material ; we are not to argue what has been done *de facto*, for many things have been done, which were never allowed ; but our question is, what has been done, and may be done, *de jure*. And then, as is said in Coke (y), *Multitudo errantium non parit errori patrociniū*. A multitude of precedents, unless they be confirmed by judicial proceedings, in courts of record, are not to be regarded ; and none of these were ever confirmed by judicial record, but they were complained of.

But upon view of the records that have been sent me on the king's part, I conceive that there is not any precedent or record of any such writ sent to the sheriff of an inland county to command the making of ships at the charge of such county ; this being the first precedent that ever was since the Conquest of this kind.

It is true, that before 25 Edw. I., there have been writs to maritime towns and ports, and other towns, as London, &c., where were ships and mariners, to provide and prepare ships, and send them to such places as the king pleased to appoint, upon just cause, for the defence of the sea and kingdom : and there is great reason why such towns having ships and mariners, should be at the king's command, to bring all or as many as he pleases for defence of the sea and kingdom, being those that had

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the most benefit of the seas, and likely to have the greatest loss if the sea and coast were not guarded; and those were appointed most commonly to be at the king's charge, but sometimes upon necessity they were appointed to be at the charge of the towns and ports adjoining: which I think was the true cause of the complaint in parliament in 25 Edw. I., and of making the statute for staying that practice; for there is no record of any such writ afterwards in Edw. I.'s time to maritime towns, to prepare or send ships at their charge.

But *annis* 10, 11, 12 and 13 of Edw. III., there being war between him and the French king, were the most writs awarded to maritime towns, to send ships at their charge sufficiently furnished: and these I think were the principal cause of the making of the stat. 14 Edw. III., st. 2, c. 1. And after that statute no such writs, nor commissions for that purpose were awarded to any maritime or inland towns, for the making of ships, but one; which record was much pressed to prove, that this course was, and might be practised after the statute of 14 Edw. III., but that record is fully satisfied, for it was grounded upon an ordinance of parliament in 1 Ric. II., that all ancient cities, boroughs, and towns, that would, should have their charters confirmed without any charge of fine, save only to make a ship of war for defence of the realm: so this was not compulsory to any, but voluntary to those that would have their liberties confirmed (z). And afterwards, in 1 Hen. IV., commissions were awarded for making such vessels of war; but those issuing without any ordinance of parliament, were complained of, 2 Hen. IV. (a), and no such writs issued forth in any age, to maritime towns, to make ships, or prepare ships at their own charge for the king's service, until the writs before us.

(z) Rot. Parl. vol. iii. p. 17, No.

(a) *Ib.* p. 458, No. 22.

This general answer I give to all the records.

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Lastly, I conceive that this writ is not legal, or warranted by any former precedent. Thereupon I conclude upon the whole matter that no judgment can be given to charge the defendant.

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Sir John Finch, C.J., of the Common Pleas (*aa*), after remarking that the writ of Aug. 4 was sufficient in form, and that the requisition to the county of Bucks contained in it was not to build a ship, but to contribute to the building of one in a fit and convenient place (*b*), proceeded thus:—The king knowing and declaring the whole kingdom to be in danger, and necessarily requiring his subjects to defend and provide for this danger at sea, may thereupon command them to prepare ships to join with his navy against the enemies of the realm, and it is clear in this case that the king must join in the charge.

My reasons that the king may thus charge his subjects to join with him in the defence of the kingdom are these.—I. The defence of the kingdom must be at the charge of the whole kingdom in general. II. The power of laying this charge is, by the policy and fundamental laws of this kingdom, solely vested in the king. III. The law that hath given this power to the king, hath given him means to exercise it.

I. That the defence of the kingdom must be at the charge of the kingdom, I shall prove, (1.) From the law of nature, which is, that everything ought to defend itself. (2.) From the law of reason: *Quod omnes tangit, ab omnibus supportari debet*. (3.) From the true use of all that we enjoy, which must be abused, if not employed to and for the good also of those that come after us. (4.) From the law of property. For the commonwealth hath a property in every man's goods, not only in time of war, but also when necessary in time of peace.

(*aa*) As to whom see Foss, Judges of England, vi. p. 310.

the argument of Sir Geo. Croke, *ante*, pp. 338, 352.

(*b*) This was by way of answer to

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II. By the fundamental laws and policy of this kingdom the sole interest and property of the sea is in the king. Sea and land make but one kingdom, and the king is *sponsus regni* (c). Parliament is an honourable court; and is an excellent means of charging the subject, and defending the kingdom; but it is not the only means. The two Houses of Parliament without the king cannot make a law, nor without his royal assent declare it: he is not bound to call the Parliament but when he pleases, nor to continue it but at his pleasure. Certainly there was a king before a parliament, for how else could there be an assembly of king, lords, and commons? And then what sovereignty was there in the kingdom but this? His power, therefore, was limited by the positive law; it cannot be denied that originally the king had the sovereignty of the whole kingdom both by sea and land.

III. It is a very true rule, that the law commands nothing to be done, but it permits the ways and means how it may be done; therefore the law that hath given the interest and sovereignty of defending and governing the kingdom to the king, doth also give the king power to charge his subjects for the necessary defence and good thereof. And as the king is bound to defend, so the subjects are bound to obey, and to come out of their own country, if occasion be, and to provide horses and arms in foreign war. Then if sea and land be but one entire kingdom and the king lord of both, the subject is bound to the defence as well of the sea as of the land; and all are bound to provide ships, men, and necessaries for that defence. And for us islanders, it is most necessary to defend ourselves at sea: therefore it was the great argument in 1588, whether it was best to fight with the Armada at sea or to suffer them to land; and it was resolved clearly, that it was better to fight with them at sea, though we lost the battle and our ships.

(c) *Magdalen College Case*, 11 Rep. 66 b.

Now I shall endeavour to prove by authority in law, and precedents, that as well the inland as the maritime towns of this kingdom must bear their own charge of defence. And (1.) There is no express authority, much less resolution or judgment, that in necessary time of danger the king may not charge the subject for defence of the kingdom. (2.) All authorities showing that the king is entrusted with the defence of the kingdom, and that in divers cases aid, taxes, subsidies, &c., are given him, prove that the subject is bound in case of danger and necessity, to pay them to the king for defence of the kingdom. (3.) The prerogative rights concerning murage, pontage, salt-petre, &c., show that for the good of the public the king is interested in the estates of the subject, and may charge them, and, if for the public good, much more, where the being of the commonwealth is in danger. (4.) The prerogative of commanding his subjects to come out of their own counties proves it. The power of commanding the person of the subject into foreign parts is in the king; much more should the estate of the subject be at his command for the necessary defence of the kingdom. (5.) All the commissions for arraying men under Edw. I., Edw. II., Edw. III., Edw. IV., Hen. VII., and Hen. VIII., &c., are grounded upon the same reason, and went out for the necessary defence of the kingdom. Now these writs are not to command the person, but a ship only, *juxta facultates suas*; and are in conformity with ancient precedents.

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Precedents, though they be not judgments, show the practice of the law. The common law is but the common usage of the land; and precedents are of good authority to prove the law in this case.

The first precedents were before the Conquest. In the times of Edgar, Alfred, Ethelred, &c., the custom was to defend the kingdom at the charge of the whole kingdom, by the edict of the king. The practice of the kings of England was to charge their subjects for the defence of

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the kingdom in case of danger. And the charge of Dane-gelt remains still, or something in lieu of it; for it is not taken away by any Act of Parliament.

In these precedents observe, (1.) That they are all upon the same common reason that this is. (2.) These writs are not limited for their number or time; so they prove the power was in the king to charge his subjects. (3.) Of these precedents, some were to inland counties, as Bucks, Huntingdon, Bedford, Leicester, Oxford, Berks, &c. And though they went not generally to all counties at one time, yet they went to them as occasion was. And if the danger had required it, the king might, if he pleased, have sent to all as well as to some.

But because there was never any time, when all the ammunition in the kingdom was drawn at one time to one place, may it not therefore be done? The commanding sometimes of one, sometimes of another, is an argument that all may be commanded as occasion requires.

But my brother Croke answered all such precedents with the rule, *Judicandum est legibus non exemplis*. To which I answer, that examples and precedents are authorities out of the law, and what of more certainty? But it is alleged, no precedents go to inland counties. I answer, for ordinary defence they go to maritime counties only, but when the danger is general, to inland counties also, and after another manner.

It has been objected—

1. That this writ is against the common law. 2. That it is against the statute law. 3. That many inconveniences will grow thereby.

1. It is against the common law, because it is without precedent. I answer, that there are precedents for it, and that the king may charge his subjects towards the defence of the kingdom in this case.

2. The second objection is, that it is against the freedom of the subject, who hath a true property in his goods,

which cannot be taken away without his actual or implied consent. I answer, that the first authority cited is that of Lambard (*d*), rehearsing the laws of the Conqueror, *Volumus et concedimus ut omnes liberi homines totius monarchiæ regni nostri habeant et teneant terras suas et possessiones suas bene et in pace, liberas ab omni exactione injustâ, et ab omni tallagio, ita quod nihil exigatur vel capiatur nisi per commune concilium, &c.* This cannot be construed that subjects should not be charged, but that they should be free from all unjust taxes. The king is not concluded by the subsequent words *omne tallagium*; which cannot be so general, but he may impose just charges towards the necessary defence of the kingdom. *Tallagium* here signifies *injusta exactio*. And my brother Croke quite left out these words following that declare and expound the former, viz., *Statuimus et firmiter præcipimus ut omnes liberi homines totius regni prædicti sint fratres conjurati ad monarchiam nostram pro viribus suis et facultatibus contra inimicos pro posse suo defendendum et viriliter servandum, &c.*, whereby it is apparent, (1). That the kingdom is to be defended by the whole kingdom *pro facultatibus* with their goods, as well as *viribus* with their persons. (2.) The passage cited comes after the chapter on tenure and services, by which tenants are bound to defend, *terras et honores suos, &c.*, which shows that the king meant not to discharge any from the general charge of defending the kingdom in case of necessity.

The next objection is the charter of King John (*e*), *Nullum tallagium imponatur nisi per commune concilium*.

I answer, these words concern the defence of his own person, not of the kingdom; and therefore it is excepted, *nisi ad redimendum corpus nostrum*; and in the original act these words are left out. The mention of scutage, murage, and other aids, shows that only those were

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(*d*) Ed. 1644, p. 170.

(*e*) Chap. 14.

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meant which were of private benefit. They were not to be imposed by the king upon any subject, without parliament, but he himself was not barred from laying such as were for the public good.

The next authority objected was Fortescue. Before I come to the words themselves, note (1.) the time when he wrote that book. It was after all the Acts of Parliament that took away the royal power; yet it did not mention them, so must needs relate to the common law. It was writ when the civil wars were between the houses of York and Lancaster, and Fortescue himself was in exile: no time then to displease the people. (2.) It shows the difference between kingdoms, when a monarch rules who challengeth all power over his subjects, and a monarch who governs according to the positive laws. The words that seemed to be against this charge are, *Rex Angliæ politice imperans genti suæ nec leges ipse sine subditorum assensu mutare poterit, nec subjectum populum renitentem onerare impositionibus peregrinis (f). Rex caput corporis politici mutare non potest leges corporis illius nec ejusdem populi substantias proprias subtrahere reclamantibus eis aut invitis (g). And Rex neque ibidem per se aut ministros suos tallagia subsidia aut quævis onera alia imponit legiis suis aut leges eorum mutat vel novas condit sine concessione vel assensu totius regni sui in parlamento suo expresso, &c. (h).*

I take the true meaning of the above passages to be (1.) That the kingdom ought to be governed by the positive laws of the land; and that the king cannot change or make new laws without a parliament. (2.) That the subject hath an absolute property in his goods and estate, and that the king cannot take them to his own use. (3.) That for his own use he cannot lay any burthen upon his subjects, without the subject's consent in parliament. (4.) That for the benefit of trade, the king may lay fitting

(f) Cap. 9.

(g) Cap. 13.

(h) Cap. 36.

impositions, and may command that which is for the necessary defence of the kingdom; which is no command of charge, but command of employing. (5.) I answer to the great objection—that the liberty of the subject is lost, and the property is drowned which he has in his estate, thus:—

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First, I say, all private property must give way to the public; though every man hath a property in his goods, yet he must not use them in detriment of the commonwealth.

2ndly. I shall remove a scandal that hath been put upon the king, how that his Majesty hath meant to make a private personal profit of it.—What he hath done is well known; and I dare confidently say, all hath been spent, without any account to himself, and that his Majesty hath been at great charge besides towards the same; and I heard it from his own royal mouth, that it never entered into his thoughts to make such use of it; and that he was bound in conscience to convert it to the use it was received for, and none other. Therefore, he that thinks the king made a revenue of it, doth highly slander his Majesty.

But though his Majesty is so gracious and loving to his subjects, and so just, that we need not fear he will charge them but upon urgent necessity; yet we know not what succeeding ages will do.—It is not well to blast succeeding ages: and if they should hereafter charge unreasonably without cause, yet this judgment warrants no such thing. Again, it is no argument to condemn the true use of a thing, because it may be abused (*i*). And it cannot be suspected, that the king will do anything against law and the public good of the kingdom: the law says the king can do no wrong, for he is *sponsus regni* (*k*).

3rdly. The next general objection was grounded on inconvenience: if such a charge may be imposed none

(*i*) *Argumentum ab abusu ad usum non valet.*

(*k*) *Ante*, p. 356.

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knows what his share will be, for the king may command it as often as he pleases ; as an example whereof was mentioned Danegelt, which in eleven years grew from twelve to forty-eight thousand pounds: therefore the law hath provided against that uncertainty, and limited the power of taxation to parliament.

I answer to this, 1st. That if danger increase, so must the charge ; again, the king may command all persons when there is necessity, and as often as he pleases he may do it. Is not this as great an inconvenience, and yet that abates not the writ ? The provision of charge must be according to the danger. Besides, no abuse of anything can take away the true and lawful use thereof. Nor can we suspect that there will be such abuse. *Ubi confidit Deus et lex, et nos etiam confidemus*. In time of imminent danger, *tempore belli*, anything, and by any man, may be done, murder cannot be punished : yet, says my brother Croke, the king cannot charge his subjects in any case without parliament ; no, not when the kingdom is actually invaded by the enemy. But truly I think, as he was the first, so he will be the last of that opinion, especially having admitted that the king is sole judge of the danger before, as indeed he is.

2ndly. There hath been, and may be, as great danger when the enemy is not discerned, as when in arms and on the land. In the time of war when the course of law is stopped, when judges have no power, when the courts of justice can send out no process, in this case the king may charge his subjects, you grant. Mark what you grant ; when there is such a confusion as no law, then the king may do it. *Dato uno absurdo, infinita sequuntur*. Moreover there may be a time of war in one part of the kingdom, and the courts of justice may sit ; as in 14 Hen. III., in Rich. II.'s and Hen. VII.'s time, when the judges sat in Westminster Hall.

(1.) Now, whether a danger be to all the kingdom, or to a part, it is alike perilous, and all ought to be charged.

(2.) The king may charge his subjects for the defence of the land. Now the land and the sea make but one entire kingdom, and there is but one lord of both, and the king is bound to defend both. (3.) Expectancy of danger, I hold, is sufficient ground for the king to charge his subjects; for if we stay till the danger comes, it may be too late. And (4.) His averment of the danger is not traversable, it must be binding when he perceives and says there is a danger; as in 1588, the enemy had been upon us, if it had not been foreseen, and provided for, before it came.

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The next objection of my brother Croke was, that there is a means provided by parliament, which will not withhold aid for the defence of the kingdom in case of necessity. And in Edw. I.'s time, Edw. II.'s time, and 4 Edw. III., a parliament was to be held every year for the defence of the kingdom *et propter ardua regni*.

But though I hold parliaments are an excellent means of raising aid for the defence of the kingdom, yet they are not the only means, for then parliament, not the king, would be the only judge, and have the defence of the realm; or else it would give the king a charge of defence, without power or means.

1. Acts of Parliament may take away flowers and ornaments of the crown, but not the crown itself; they cannot bar a succession, nor can our kings be attainted by them, and Acts that bar them of possession are void. 2. No Act of Parliament can bar a king of his regality, as that no lands should hold of him; or bar him of the allegiance of his subjects; or the relative on his part, as trust and power to defend his people: therefore Acts of Parliament to take away his royal power in the defence of his kingdom are void.

(1.) In the stat. 25 Edw. I., c. 5, the words are, "aids or taxes, granted to the king, shall not be taken for a custom or precedent:" and c. 6, "moreover, we have

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granted for us and our heirs, that for no business from henceforth, we shall take such manner of aids, taxes, nor prises due and accustomed." And c. 7, a release of toll upon every sack of wool: "and grant, that we will not take such things without their common assent and good liking, saving, to us and our heirs, the customs granted by the commons aforesaid."

As to the statute, *De Tallagio non concedendo*, c. 1. *Nullum tallagium imponetur nisi per commune concilium regni nostri*, c. 2, 3, 4, 5, &c.—I answer First. These words must have relation to the aids before, and there be divers aids; as some by tallage, some by way of prise upon goods, and ransom of his Majesty's person, &c., the king thereupon makes this grant, which hath relation to such aids as were granted voluntarily. Secondly. Ancient aids are there reserved, as redeeming the king's body, *pur faire fitz chevalier, et pur marier son file eigne*: and so all other ancient aids, which are to be understood with an *ad redimendum corpus*, &c.

And to the statute *De Tallagio non concedendo*, I further answer, (1.) That *nullum tallagium imponetur*, &c., signifies, no unlawful tallage shall be imposed upon the subject without his consent; or else the aids *pur faire fitz chevalier et pur file marier*, had not been excepted. (2.) No aids shall be imposed but by contribution of the king and people; and here the king is taxed as well as they. (3.) An Act of Parliament can by no means take it away, much less by those general words.

As to the 14 Edw. 3, c. 1. That no man from henceforth shall be chargeable, but by common consent in parliament.

To this I answer, that though it be but temporary in some parts, yet it is binding only *secundum subjectam materiam*: and the words are general, as in the other statute *De Tallagio*, &c., besides the practice in that king's time, and after, best interprets it.

25 Edw. III., c. 8. No finding of men at arms, unless by consent, much less finding of ships.

This takes not away any former law; and therefore the precedents following, 4 Hen. IV., show that it does not reach to this case.

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As to the objection that a commission went forth, 2 Hen. IV., for the defence of the sea, whereof complaint was made in parliament with desire that it might be repealed, and it was done.

Answer.—The petition was that it might be released; and the answer was but this, that it should, but the king would treat with the council about it; and it was but a repeal of his commission then only.

Objection.—1 Ric. III., c. 2, where the king grants that he would not thereafter charge his subjects by benevolences, or any suchlike charge, but that such exactions should be annulled; and the subject charged by no such charge or imposition, *i.e.*, by no such charge of money.

Answer.—That statute was only against benevolences, and made by a king who had reason, as we all know, to please the people for his own ends.

Objection.—In the statute of tonnage and poundage, granted for the defence of the sea, the words are, 1. That no tallage or aid shall be without Act of Parliament. 2. That the king hath means to defend the kingdom with a protestation not to draw it into example (*l*).

I will not argue whether tonnage and poundage were before this Act of Parliament, nor that time out of mind they were granted to the king, but my answer is, they are only for the ordinary defence of the sea. And the protestation of 4 Hen. IV., is a protestation of the Commons only: and this charge is not taken away thereby, and tonnage and poundage are for and towards the defence of the sea: so all the Acts are, and so I agree.

The last objection is the Petition of Right. That no

(*l*) *Vide* Rot. Parl. vol. iii. p. 493; *ante*, p. 278.

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charge shall be imposed upon the subject, but by parliament.

I was then Speaker of the Lower House, and have reason to remember what was done. And I say, 1. There is no mention of this case. 2. There was no new thing granted, but only the ancient liberties confirmed, taking notice of the Commons' protestation not to bind the king from his ancient rights. 3. Look upon the prayer, what is decided: and the main scope was (1.) Generally against loans, and this charge could not be included in such words. (2.) Imprisonment without showing cause. (3.) Billeting of soldiers. And (4.) mariners lying within the land.

The Chief Justice then argued that the writ for levying ship-money was in proper form, and concluded that by the common law, and the fundamental policy of the kingdom, the king may charge his subjects for the defence of the kingdom, and that the king may charge his subjects towards the defence thereof when it is in danger; that the king is sole judge of the danger, and ought to direct the means of defence.

Proceedings
in Parlia-
ment.

The judgment in the above case entered for the Crown "gave much offence to the nation, and occasioned great heart-burnings" in parliament (*m*), by which assembly resolutions were, after long debate, agreed to, condemnatory of the judicial opinion, proceedings, and judgment against Mr. Hampden above set out, and an Act (*n*) was passed declaring and enacting as follows:—

16 Car. 1,
c. 14.

"That the charge imposed upon the subject for the providing and furnishing of ships, commonly called ship-money, and the extra-judicial opinion of the justices and barons, and the writs, and every of them, and the agreement or opinion of the greater part of the justices and barons, and the judgment given against John Hampden, Esq., for the payment of ship-money, were and are con-

(*m*) 3 St. Tr. 1254.

(*n*) 16 Car. 1, c. 14.

✓ contrary to, and against the laws and statutes of the realm, the right of property, the liberty of the subject, former resolutions of parliament, and the Petition of Right.

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That all and every, the particulars prayed or desired in the said Petition of Right, shall from henceforth be put in execution, and shall be firmly and strictly holden and observed, as in the same petition they are prayed and expressed; and that all and every the records and remembrances of all and every the judgments against the said John Hampden, &c., and all and every the proceedings whatsoever, upon or by pretext or colour of any of the said writs, commonly called ship-writs, and all and every the dependants on any of them, shall be deemed and adjudged to all intents, constructions, and purposes, to be utterly void and disannulled, and that all and every the said judgments, &c., shall be vacated and cancelled in such manner and form as records used to be that are vacated."

✓ The prerogatives of the Crown "are not given for the personal advantage of the king, but they are allowed to exist because they are beneficial to the subject. They are therefore to be guarded on account of the public; they are not to be extended further than the laws and constitution of the country have allowed them; but within those bounds they are entitled to every protection." Such are the words of Lord Kenyon, C.J., in a case below cited (o), and to a like effect argues Sir Geo. Treby in

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rogatives—
how limited.

(o) *Per* Lord Kenyon, C.J., *Rorke v Dayrell*, 4 T. R. 410; *per* Lord Hardwicke, C., *Ex parte Barnsley*, 3 Atk. 171; 2 Steph. Com. 469.

"The people's liberties strengthen

the king's prerogative, and the king's prerogative is to defend the people's liberties."—Declaration of Charles I., cited *per* Sir R. Berkley, J., 3 St. Tr. 1090.

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The East India Co. v. Sandys (p). "The prerogative is great, but it has this general and just limitation, that nothing is to be done thereby that is mischievous or injurious to the subject" (q).

The above propositions are exemplified by the final issue of the two preceding cases, which involved "a constitutional question of the first magnitude"—the right of the Crown to levy taxes on the subject. "James I.," remarks Mr. Hargrave (r), "claimed the right of imposing duties on imported and exported merchandize by prerogative. His son, the unfortunate Charles, not only persisted in the claim, but added to it the equally formidable pretension of ship-money. Realized, these claims, with loans, benevolences, monopolies, &c., would have comprised nearly a complete system of extra-parliamentary taxation; for imposition at the ports was calculated to serve the purpose externally, ship-money to operate internally. Had they been acquiesced in, parliaments would soon have become unnecessary assemblies; the mildness of a limited monarchy would gradually have degenerated into the harshness of an absolute one; a legal government would have been corrupted into a tyranny." In order that the force of Mr. Hargrave's remarks may be appreciated, we will, in the first part of this Note, specify the various methods of declaring its will formerly adopted by the Crown in derogation of the legislative functions of parliament, and then offer some observations pertinent to these questions: May the sovereign, *jure coronæ*, tax our imports? May he, in virtue of his prerogative levy ship-money on the subject?

(p) 10 St. Tr. 386.

(r) 2 St. Tr. 371; Hargr. Jurisc.

(q) *Et vide* 2 Inst. 63; 3 *Id.* 84; Exerc. vol. i. p. 322.
Plowd. 230; *ante*, p. 139.

Glancing at our history since the Conquest, we recognise one of the earliest modes of enacting laws as having been by charter emanating from the Crown. Already (s) has been cited an important clause from the Charter of William I., which is so framed that its assurances might seem to have flowed spontaneously from the Crown, being in form not like an agreement or deed *inter partes*, but similar rather to a bond or instrument unilateral. A like remark is applicable to the so-called charters of Hen. I., of King Stephen, and of Hen. II., exhibited in the volumes below cited (t), after a careful collation of existing manuscripts under the authority of parliament.

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In the essay prefixed by Blackstone to his collection of Great Charters, is minutely explained the mode in which the original Magna Carta was extorted from King John; and by comparing his remarks with the authentic documents set forth in the collection of Statutes of the Realm (u), we deduce that the Charter of King John partook of the nature of a contract more than did any of those granted by his predecessors. It was, in fact, preceded by and compiled from certain articles of agreement between the king and barons, just as an ordinary agreement may be and often is framed from rough memoranda, or heads of agreement assented to by the contracting parties. This Great Charter was witnessed by some of the leading prelates and nobility of the realm; so likewise was that granted in the 9th Hen. III. (x), which, whilst in most

Magna
Carta.

(s) *Ante*, p. 231.

(t) Ancient Laws and Institutes of England, A.D. 1840; Statutes printed by order of Parliament, A.D. 1810, vol. i.

(u) Vol. i. See also Stubbs, Docu-

ments illustrative of Eng. Hist., p. 238.

(x) In commenting upon which Lord Coke observes: "It is true that of ancient time nothing passed from the king of franchises, liberties, privileges,

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essential points it affirmed the Charter of King John, differed from it in some particulars (y). This latter Charter was, by the *Confirmatio Cartarum* (25 Edw. I.), itself ratified and confirmed, the sovereign thus addressing his subjects (z): "Know ye that we have granted for us and our heirs that the Charter of Liberties made by common assent of all the realm in the time of King Henry our father, shall be kept in every point without breach."

Further, "the king wills (a), that if any judgment be given from thenceforth contrary to the points of the Charter aforesaid by the justices or by any other our ministers, it shall be undone, and holden for naught."

Magna Carta, says Lord Coke (b), referring to the Charter of Hen. III., was for the most part "declaratory of the principal grounds of the fundamental laws of England;" and for the residue it supplies some defects of the common law. It has been "confirmed, established, and commanded to be put in execution" by many statutes (c).

The peculiar office of a royal charter—when in its

&c., but it was by the advice of his council expressed under *his testibus*. . . . This conclusion of the king's grants with *his testibus* was used by King Henry 3 and his progenitors, kings of this realm before him, and by his son Edward 1, and by Edward 2 and Edward 3 after him. Afterwards, in the beginning of the reign of Richard 2, I find the clause of *his testibus* was left out, and instead thereof came in *teste meipso*, in this manner: *in cujus rei testimonium has literas nostras fieri fecimus patentes: teste meipso*; which since by

all his successors, kings and queens of this realm (except in creations [*sc.* of nobility]), hath been used.

"Those that had *his testibus* were called *cartæ*, as this charter is called *Magna Carta*; and so is *carta de forestâ*, &c., and those other that be *teste meipso* are called letters patents."

(y) Blackst. Great Charters, Introd. pp. xxix. *et seq.* Stubbs, Documents, p. 344.

(z) Chap. i.

(a) Chap. ii.

(b) 2 Inst. Pref.

(c) *Id.*; ante, p. 58, n. (y).

nature legislative—was to confer privileges, to redress grievances, to declare and affirm the common law. Copies of such charters were deposited for safe custody in the principal monasteries and cathedral churches, and were read and published to the people (*d*). It was not competent to the king to avoid his own charter (*e*).

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A proclamation is "a notice publicly given of anything whereof the king thinks fit to advertise his subjects" (*f*). Mr. Reeves (*g*) tells us that "proclamations had, from very early times, been the usual method by which our kings signified their commands and enforced their authority. They were framed for the purposes of government and of the state. They seemed a necessary part of the executive magistrate's power; and having grown up with the monarchy, they might in those times be looked on with reverence by the people without discovering how nearly they approached to acts of legislation." Lord Coke (*h*) admonishes his readers that "proclamations are of great force when grounded on the laws of the realm." And Blackstone (*i*) observes that, "though the making of laws is entirely the work of a distinct part—the legislative branch—of the sovereign power, yet the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate. And therefore his constitutions or edicts concerning these points, which we call 'proclamations,' are binding upon the subject where they do not either contradict the old laws or tend to establish new ones; but only enforce the execution of such laws as are already in

Proclama-
tions.

(*d*) See, for instance, the *Confirmatio Cartarum*, 25 Edw. 1, c. 3; *post*, p. 384.

(*e*) 2 Inst. Pref.

(*f*) Toml. Law Dict. *ad verb.*

(*g*) Hist. Eng. Law, Ed. 1869, vol. iii. p. 504.

(*h*) 3 Inst. 162.

(*i*) 1 Com. 270.

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being, in such manner as the king shall judge necessary" (*k*). In this passage is indicated the line which a constitutional lawyer of the present day would draw between a legal and an illegal proclamation emanating from the Crown. It is competent to the Crown thus to declare and enforce the execution of existing law—it is not competent to the Crown thus to enact or to alter the existing law (*l*). In early times, however, the sovereign frequently infringed by proclamations the rights and liberties of the subject, and hence for centuries was an intermittent conflict waged between the king and people. During the reign of Henry VII., royal proclamations seem to have enjoyed higher consideration than at any former period (*m*); and in the time of his successor a signal instance of concession to the royal authority presents itself. The stat. 31 Hen. 8, c. 8, reciting in its preamble "the contempt and disobedience of the king's proclamations by some who did not consider what a king, by his royal power, might do . . . and considering that many occasions might require speedy remedies, and that delaying these till a parliament met might occasion great prejudices to the nation," enacted that the king for the time being, with advice of his council, might set forth proclamations, with pains and penalties in them, to which

(*k*) A statute may, by express words, be operative until annulled by royal proclamation.—2 Inst. 742. A statute may also, by express words, become operative when enforced by proclamation.

As to the publication of Royal Proclamations, see 40 & 41 Vict. c. 41.

(*l*) Lord Coke says (12 Rep. 75), that "it is a grand prerogative of the king to make proclamation (for no

subject can make it without authority from the king or lawful custom);" "but we do find divers precedents of proclamations which are utterly against law and reason, and for that void; for *quæ contra rationem juris introducta sunt non debent trahi in consequentiam*."

(*m*) 2 Millar, Eng. Gov. pp. 409, 410.

obedience should be given as if they had been made by Act of Parliament. This remarkable statute certainly placed restrictions on the royal power to be exercised by proclamation; for it enacted that no man should, by virtue thereof, suffer in his estate, liberty, or person, and that the laws and customs of the realm should not be subverted thereby. Nevertheless, it did permit proceedings to be taken against those who contumaciously disobeyed the king's proclamations, and authorised some punishment—such as fine, forfeiture, or imprisonment, to be imposed after a conviction (*n*). This statute was repealed by 1 Edw. 6, c. 12, s. 5; it is here cited, however, as showing how exalted was at one time the royal prerogative in regard to the issuing of proclamations, whence we may the less wonder at the efficacy which, under the Stuart dynasty, was by the Court party sought to be ascribed to them (*o*).

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In the time of Queen Mary proclamations of an arbitrary and illegal import were often issued (*p*). And the proclamations put forth under Elizabeth seem to show that the Crown then claimed a sort of supplemental right of legislation to perfect and carry out what the spirit of existing laws might require, "as well as a paramount supremacy, called sometimes the king's absolute or sovereign power, which sanctioned commands beyond the legal prerogative for the sake of public safety whenever the council might judge that to be in hazard" (*q*).

(*n*) See Hume, Hist. Eng., vol. iv. pp. 237, 238. p. 237.

(*o*) See 2 Hall. Const. Hist. Eng., p. 25; *The Case of the Seven Bishops*, post. Clarendon's Hist. i. 68.

(*p*) See for instance, 2 Inst. 62, 63.

(*q*) 1 Hall. Const. Hist. Eng.

Referring to the reign of Elizabeth, Hume observes (Hist. Eng. vol. v. 463), that "in reality the Crown possessed the full legislative power by means of proclamations, which might affect any matter even of the greatest importance, and which the Star-chamber took care to see more vigor-

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During the reign of James I. proclamations were very frequently issued (*r*), and divers questions touching this branch of the prerogative were referred to the great officers of the Crown. *Ex. gr.*, whether the king might by his proclamation prohibit the erection of new buildings in and near to London (*s*). Various resolutions were come to in the case cited, and various propositions are laid down by Lord Coke in his report of it, limiting the power of the Crown by proclamation. The king by his proclamation cannot alter the common or the statute law (*t*); the king cannot by his proclamation create into an offence that which was not an offence before—that which cannot be punished without proclamation cannot be punished with it. But the king, for prevention of offences, may by proclamation admonish his subjects that they keep the laws and do not offend against them (*u*); and the disobeying a proclamation, when legal, has been said to constitute a substantive offence, for which the offending party may be punished (*x*).

The Petition of Grievances (*y*), presented by the Com-

ously executed than the laws themselves. The motives for these proclamations were sometimes frivolous and even ridiculous."

(*r*) See the Collection of Royal Proclamations, *temp.* Jac. 1.

(*s*) *The Case of Proclamations*, 12 Rep. 74; S. C. 2 St. Tr. 723.

(*t*) King James I, however, assumed to repeal by proclamation the stat. 5 Ric. 2, st. 1, c. 2, on the ground that it had fallen into desuetude. See Proclamations *temp.* Jac. 1, p. 144. Edward 3 also by proclamation revoked and declared null the stat. 15 Edw. 3, Rot. Parl. vol. ii. pp. 128, 139.

(*u*) See, for instance, the Proclamation of March 26, 1702, "for restraining the spreading false news, and printing and publishing of irreligious and seditious papers and libels."—15 St. Tr. 359.

(*x*) Chitt. Pre. Cr. 107; Fortescue, De Laud. Leg. Ang. pp. 59, 60; 2 Steph. Com. 509.

As to the efficacy of proclamations, see also, *per* Lord Ellesmere, 2 St. Tr. 664; Parl. Hist. vol. v. p. 250.

"I never heard an indictment to conclude *contra regiam proclamationem*."—*Per* Sir E. Coke, 12 Rep. 75.

(*y*) 2 St. Tr. 524-6.

mons A.D. 1610 to King James I., makes reference to illegal proclamations. The Commons therein insist on "the indubitable right of the people of this kingdom not to be made subject to any punishments that shall extend to their lives, lands, bodies, or goods, other than such as are ordained by the common laws of this land, or the statutes made by their common consent in parliament;" and then they protest as follows: that "proclamations have been of late years much more frequent than heretofore, and that they are extended not only to the liberty, but also to the goods, inheritances, and livelihood of men—some of them tending to alter points of law, and make them new; other some made shortly after a session of parliament for matter directly rejected in the same session; other, appointing punishments to be inflicted before lawful trial and conviction," and so forth. "By reason whereof there is a general fear conceived and spread amongst your Majesty's people, that proclamations will by degrees grow up and increase to the strength and nature of laws, whereby not only that ancient freedom will be as much blemished (if not quite taken away) which their ancestors have so long enjoyed; but the same may also in process of time bring a new form of arbitrary government upon the realm. And this our fear is the more increased by occasion as well of certain books lately published, which ascribe a greater power to proclamations than heretofore hath been conceived to belong unto them: as also of the care taken to reduce all the proclamations made since your Majesty's reign into one volume (z), and to print them in such form as Acts of Parliament formerly have been, and still are used to be; which seemeth to imply

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(z) *Ante*, p. 374, n. (r).

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a purpose to give them more reputation and more establishment than heretofore they have had."

In the foregoing remonstrance by the Commons is inserted a catalogue of some of the proclamations whereof complaint is made (a); and with this list may usefully be compared that given by Mr. Chitty in his work upon the Royal Prerogatives (b), for by such comparison we may succeed in drawing a line between legal and illegal proclamations.

During the succeeding reigns of the Stuarts, the sovereign frequently addressed proclamations to his subjects, sometimes affecting, *virtute coronæ*, to dispense with existing laws, or with the penalties consequent on breach of them (c), and sometimes assuming to dictate to the people in respect of matters, *per se* indifferent, and as to which perfect liberty of action should be allowed.

Since the Revolution, the legality of royal proclamations and orders issued by the privy council has on various occasions given rise to parliamentary discussion, and enactments have sometimes been deemed necessary to indemnify those who had advised or acted under them (d).

(a) 2 St. Tr. 525-6.

(b) Pre. Cr. pp. 104-6.

(c) See *The Case of the Seven Bishops*, *post*; Proclamations *temp.* Car. 1; 2 Hall. Const. Hist. Eng. p. 28.

(d) See the Debates preliminary to the passing of the stat. 7 Geo. 3, c. 7, entitled "An Act for indemnifying such persons as have acted for the service of the public, in advising or carrying into execution the Order of Council of the 26th September last, for laying an embargo on all ships

laden with wheat or wheat-flour, and for preventing suits in consequence of the said embargo." (Cobbett, Parl. Hist. Eng. vol. xvi. pp. 246, *et seq.*) The preamble of the above statute recites that the said order "could not be justified by law, but was so much for the service of the public, and so necessary for the safety and preservation of his Majesty's subjects, that it ought to be justified by act of parliament, and all persons advising or acting under or in obedience to the same indemnified."

An ordinance is defined by Mr. Hakewill (*e*) as being next in degree of strength to a statute—as being a constitution made by the king himself, and all the prelates, earls, and barons—not at the council table or in the king's chamber, but sitting solemnly in parliament; and the only “essential difference between this and an Act of Parliament is, that this hath not the assent of the Commons.” To a like effect, also, Sir E. Coke (*f*) observes, that though an Act of Parliament is an ordinance, yet every ordinance is not a statute; “for every statute must be made by the king, with the assent of the Lords and Commons; and if it appear by the Act that it was made by two of them only, it is no statute” (*g*). Remarks such as the foregoing, though in the main accurate, must assuredly be accepted with qualification; for some ordinances, as further observed by Mr. Hakewill (*h*), have by estimation amongst us had the force of statutes,—for instance, the ordinance of Meriton in the 20th year of Hen. III., which, though made by the king, lords, and prelates, without assent of the Commons, “hath yet by continuance of time got not

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See also the Debates on the Orders in Council, A.D. 1808, 10 Cobbett, Parl. Debates, particularly Lord Erskine's speech, *Id.* pp. 929, *et seq.*; *et vide stat.* 48 Geo. 3, c. 37.

(*e*) *Ante*, p. 272.

(*f*) Co. Litt. 159 b., and Hargr. Note (2); 2 Reeves, Hist. Eng. Law, Ed. 1869, p. 436.

(*g*) Lord Coke also observes that “the difference between an act of parliament and an ordinance in parliament is, for that the ordinance wanteth the threefold consent, and is ordained by one or two of them.”—4 Inst. 25.

A.D. 1642, and during the succeed-

ing years, the enacting words used were: “The Lords and Commons in Parliament do ordain and declare,” or some equivalent phrase. *Vide* Scobell's “Collection of Acts and Ordinances of Parliament.”

In the 5th Edw. 2, certain “ordinances” were passed by the prelates, earls, and barons, which were revoked in the 15th Edw. 2, on the ground that “by the matters so ordained the royal power of our said lord the king was restrained in divers things contrary to what ought to be, to the blemishing of his royal sovereignty and against the estate of the crown.”

(*h*) *Ante*, p. 272.

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only the strength, but the name also of a statute." The ninth chapter, it may be remembered, of this ordinance records the appeal made by the lords spiritual to the earls and barons, that they would consent that all such as were born before wedlock should be accounted legitimate in accordance with the canon law. But to this appeal "all the earls and barons with one voice answered that they would not change the laws of the realm which hitherto have been used and approved." The famous statute (as it is usually called) of *Quia Emptores* (18 Edw. 1, c. 1) might, according to the definition above offered, more accurately be designated an ordinance, the enacting words which there follow the preamble being—"our lord the king in his parliament at Westminster, at the instance of the great men of the realm" (no specific mention being made of the Commons), "granted, provided, and ordained," and so forth.

A bare inspection, however, of the introductory words professing to set forth the authority of an instrument such as now alluded to, would not always enable the student rightly to determine whether it were a statute or an ordinance; the subject-matter of such instrument might likewise need to be considered. Was it meant to be permanent or temporary in its operation? Was it meant to innovate on the established law? Were its provisions such as might not improbably call for early alteration, amendment, or abrogation (*i*)?

In illustration of what has just been said we may here mention, in the 37th year of Edw. III. numerous petitions were presented by the Commons and answered

(i) See 3 Hall. Midd. Ages, pp. 49-51; Rot. Parl. vol. ii. pp. 206, 253, 258.

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by the Crown, and at the end of the then session the king demanded of the "great men and Commons" whether the things granted in that parliament—being in their nature new and not before known—should be accorded by way of ordinance or of statute; to which the reply was, that it would be well to grant by way of ordinance rather than by statute, in order that anything needing amendment might be amended in the next parliament: and it was done accordingly—so much of the subject-matter of the petitions as was acceded to being promulgated in the form of an ordinance (*k*). In the succeeding year we find that such royal ordinance, having in some particulars proved grievous to the people, as well merchants as others, was reconsidered and amended (*l*). So in the twenty-second year of his reign, the same king replied to a petition of the Commons, that the accustomed laws and process could not be changed unless by a "new statute" (*m*).

The mode of legislation prevalent in early times is, in the Preface to Mr. Ruffhead's edition of the Statutes at Large, well epitomised, and in Mr. Barrington's "Observations on the more Ancient Statutes, from Magna Carta to 21 Jac. 1, c. 27" (*n*) is elaborately discussed. Inferences must not too hastily be drawn from the form

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(*k*) Rot. Parl. vol. ii. p. 280, Nos. 38 *ad fin.* 39.

(*l*) *Id.* p. 286, No. 11, *et seq.*

(*m*) *Id.* p. 203, No. 30.

As to the distinction between an ordinance and a statute, see further Reeves, *Hist. Eng. Law*, Ed. 1869, p. 436.

"Ordinances," says Sir F. Dwaris (Treatise on Statutes, 2nd ed. p. 7), "will perhaps be found on inquiry to include *in general* patents and

charters, and to indicate in early times those legislative acts or edicts of the king in his court, or assisted by his council (*concilium regis ordinarium*), or, in cases of importance, by his great council (*magnum concilium*), which were either declaratory of the old law or directory to his justices in what manner to proceed in particular cases."

(*n*) Edit. 1795.

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of an ancient statute or legislative instrument regarding the efficacy attaching to it, or the precise source whence it emanated (*o*). Even in the reign of Edward I., says Mr. Ruffhead (*p*), when laws were sometimes “penned with a brevity and perspicuity which might do honour to more enlightened days,” the greater portion of the statutes are vague and unsettled in form, and some of them are defective in substance. In many there are no words expressing by what authority they were promulgated; in others the authority is variously described. Sometimes the laws seem to issue from the king alone,—sometimes from the king and lords jointly, without the concurring assent of the Commons.

The instances subjoined—occurring *temp.* Henry III. and the three first Edwards—may suffice to illustrate the above remark. In the statute of Marlbridge (*q*), the enacting words are:—“The said king our lord providing for the better estate of his realm of England, and for the more speedy ministration of justice as belongeth to the office of a king, the more discreet men of the realm being called together, as well of the higher as of the lower estate, it was provided, agreed, and ordained,” &c. The statute of Westminster I. (*r*) is set forth in the preamble as the act of King Edward, made at Westminster, “by his council and by the assent of archbishops, bishops, abbots, priors, earls, barons, and all the commonalty of the realm being thither summoned.” During the same reign, also, we meet with the following formulæ, professing to indicate the source whence emanated each respectively of the enactments cited:—The king himself pro-

(*o*) *Vide* Fortescue, De Laud. Leg.
Ang. by Amos, 59, 60.

(*p*) Pref. p. 1.

(*q*) Stat. de Marleberge, 52 Hen. 3.

(*r*) 3 Edw. 1.

viding for the wealth of his realm and the more full ministrations of justice, as to the office of a king belongeth, the more discreet men of the realm as well of high as of low degree being called thither, it is provided and ordained, &c.(s); "We, therefore, to the profit of our realm, intending to provide convenient remedy by the advice of our prelates, earls, barons, and other liegemen of our kingdom, being of our council, have provided, made, and ordained," &c. (t); "The king, by himself and by his council, hath ordained and established" (u); The king, "at the instance of the great men of the realm, granted, provided, and ordained" (x); The king, "in his full parliament and by his common council, hath ordained" (y); *Rex*—"vult et precepit" (z)—"*ad parliamentum suum concessit ordinavit et statuit*" (a).

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Somewhat later (*temp.* Edw. III.), we find the following:—At the parliament holden at Westminster, &c., the king, "by the assent, of the prelates, earls, barons, and other great men of the realm there assembled . . . and at the request of his people, hath granted and established these things underwritten, which he wills to be kept and maintained for ever" (b); The king "hath ordained and established, by the assent of the said prelates, earls, barons, and other nobles of this realm, and at the request of the said knights and commons" (c).

In regard to the efficacy of legislative instruments

(s) 6 Edw. 1.

(t) 7 Edw. 1.

(u) *De Mercatoribus*, 11 Edw. 1;
13 Edw. 1, st. 3.

(x) *Quia Emptores*, 18 Edw. 1,
t 1; 21 Edw. 1, st. 2.

(y) 20 Edw. 1, st. 3.

(z) 25 Edw. 1.

(a) 28 Edw. 1, st. 2.

(b) 5 Edw. 3.

(c) 10 Edw. 3, st. 1 and st. 2;
and see Stubbs, Documents, p. 46,
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which fail distinctly to set forth that the three estates of the realm concurred in them, a conflict is noticeable amongst authorities. Upon this subject, in *The Prince's Case* (d), we read:—"If an Act of Parliament be penned by assent of the king and of the Lords spiritual and temporal and of the Commons, or it is enacted by authority of parliament, it is a good Act but the most usual way is, that it is enacted by the king by the assent of the Lords spiritual and temporal and of the Commons;" and again, "There are many statutes which are indited *quod dominus Rex statuit*, yet if they be entered in the Parliament Roll and always allowed for Acts of Parliament, it shall be intended that it was by authority of parliament; but if an Act be penned that the king, with the assent of the Lords or with the assent of the Commons, &c., it is no Act of Parliament, for three ought to assent to it, *sc.*, the King, the Lords, and the Commons, or otherwise it is not an Act of Parliament; and by the record of the Act it is expressed which of them gave their assent, and that excludes all other intendments that any other gave their assent; and so there is a difference between a general and particular penning of an Act of Parliament." On the other hand, Lord Hale observes (e), that "styles that in propriety take not in the whole parliament, but are in propriety applicable to the king alone, or to the king and his *concilium ordinarium*, are applied to acts or grants in parliament made by the king and both Houses and true Acts of Parliament," and "so in truth are applied many styles and titlings that in propriety are not so applicable to the whole parliament; yet were the

(d) 3 Jac. 1; 8 Rep. 1, 20 b.

(e) Jurisdiction of Lords, p. 20, cited Dwarr. on Stats. 2nd ed. p. 7.

businesses transacted and assented to by the whole parliament."

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Such being the conflict of authorities, an inspection of the Statute Book and observance of its irregularities might perhaps lead to the conclusion that it would be unreasonable to deny the validity of any of the earlier enactments, merely because the assent of the Commons is not *totidem verbis* expressed thereto; since it is evident (1) that their assent after it was allowed in terms was often over-ruled in practice; (2) that where we may safely presume their assent to have been given, it frequently was not expressed upon the roll; (3) that there was not at the period referred to any settled form of declaring the concurrence of the several estates of the realm in a legislative instrument (*f*). An examination of the Statute Book further shows us that the form of penning the enacting words of an Act of Parliament now in use was gradually adopted towards the close of the fifteenth and during the sixteenth century; bills, moreover, in the shape of complete statutes having been first introduced into either House in the time of Henry VI. (*g*).

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In Edw. III.'s reign (*h*), however, and thence until the reign of Hen. V., the method of making Acts of Parliament was this:—A bill in the nature of a petition was delivered to the Commons, and by them sent to the Lords, where it was entered upon the Lords' rolls, together with the royal assent when given (*i*). Of this petition, and the

(*f*) Statutes at Large, by Ruffhead, Pref. xvi.

(*g*) May, Parl. Pract. 9th ed. p. 520.

(*h*) 2 Reeves, Hist. Eng. Law, Ed. 1869, pp. 433, 436; 4 Inst. 25, where Lord Coke says that "in ancient time all Acts of Parliament were in

form of petitions."

(*i*) See stat. 21 Ric. 2, c. 16, by which authority was given to certain commissioners to examine and answer petitions to the Crown, which during the sitting of parliament had not for lack of time been determined.

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king's answer to it, the judges used at the end of the parliament to draw up the substance in the form of a statute, which was afterwards entered upon the Statute Roll.

At the impeachment of the Earl of Macclesfield for high crimes and misdemeanors (*j*), the process observed in passing an ancient statute is thus stated:—There were two rolls, the one, in the nature of a journal, called the Parliament Roll, in which the petition of the Commons was entered with the king's answer thereto, agreeing to the whole or some portion of its prayer, or perhaps wholly differing from it; on the other roll, called the Statute Roll, was entered the Act as drawn up in form by the judges, and this Act was afterwards promulgated and proclaimed upon a writ issued to the sheriff of each county (*k*).

It is thus manifest that the petition upon which an ancient statute was drawn should be perused in order that the Act itself may be understood (*l*). So long since, however, as the *Case of Præmunire*, 39 Edw. III. upon the stat. 27 Edw. 3, c. 1, against the Bishop of Chichester, it being objected for the bishop, 1st, that the Act whereupon the writ was grounded was no statute; 2ndly, that if it were a statute it was never published in the county; Sir R. Thorpe, C.J., answered, "Although proclamation be not made in the county, every one is

(*j*) 16 St. Tr. 1389-1390.

(*k*) Till the reign of Henry 7, statutes were engrossed on parchment and proclaimed by the sheriff of each county in virtue of the king's writ. "This was the ancient law of England, that the king's commandments issued and were published in form of

writs—an excellent course and worthy to be restored." 2 Inst. 526.

"Printing comes in lieu of the ancient promulgation by the sheriff." Ruffhead, Statutes at Large, Pref. xvii.

(*l*) Pamphlet by F. Plowden, pp. 48, 49.

bound to take notice of that which is done in parliament; for as soon as the parliament hath concluded anything, the law intends that every person has notice thereof, for the parliament represents the body of the whole realm, and therefore it is not requisite that any proclamation be made, seeing the statute took effect before" (m).

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One great mischief incident to the former mode of legislation was, that the Acts as prepared by the judges sometimes materially differed from the petitions upon which they affected to be founded (n). Nor does there seem to have been any method—unless by subsequent petition or remonstrance—of preventing or correcting this abuse, inasmuch as the Act in its complete state was not again submitted to the two inferior branches of the legislature. To remedy this evil a petition was presented by the Commons in the 5th year of King Richard II., A.D. 1381, claiming for themselves an equal participation in the drawing up of statutes. This petition sets forth, as part of the "liberty and freedom" of the Commons, that "there should no statute nor law be made unless they should have given thereto their assent," and the petition prays that thenceforth on complaints by the Commons no law be thereupon made and engrossed as statute, with additions, diminutions, or the insertion of material words, without assent of the Commons. And by way of answer to this petition, the

(m) 4 Inst. 26; *R. v. Sutton*, 4 M. & S. 542.

(n) In *The Earl of Macclesfield's Case*, cited *supra*, p. 384, n. (j), it was accordingly argued that the Parliament Roll was only a voucher to the Statute Roll, and that in many

instances this voucher was not pursued; the entry on the Statute Roll being in terms different from that on the Parliament Roll—consequently a change in the mode of passing laws was afterwards found necessary.

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king granted that "thenceforth nothing be enacted to the petitions of his Commons that be contrary of their asking, whereby they should be bound without their assent," "saving always to our liege lord his royal prerogative to grant and deny what him lust of their petitions and askings" (o).

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But though irregularities, the precise cause and significance of which it may be impossible to determine, did for some centuries after the Conquest occur in the process of legislation, the theory of our constitution respecting it seems accurately set forth by Fortescue in a well-known passage:—"A king of England," he says (p), "cannot at his pleasure make any alterations in the laws of the land, for the nature of his government is not only regal but political. Had it been merely regal he would have a power to make what innovations and alterations he pleased in the laws of the kingdom, impose tallages and other hardships upon the people whether they would or no without their consent;" but "it is much otherwise with a king whose government is political, because he can neither make any alteration or change in the laws of the realm without the consent of the subject, nor burthen them against their wills with strange impositions, so that a people governed by such laws as are made by their own consent and approbation enjoy their properties securely, and

(o) See Taylor, Book of Rights, p. 94.

See also the remonstrance of the Commons, Rot. Parl. vol. 3, p. 418, No. 25, temp. Henry 4.

In the 7th and 8th Hen. 4, "it was enacted at the request of the Commons that certain of the Commons

House should be present at the engrossing of the Parliament Roll;" Rot. Parl. vol. 3, p. 585, No. 65; *et vide* Rot. Parl. vol. 4, p. 22, No. 22, temp. 2 Hen. 5.

(p) Fortesc. De Laud. Leg. Ang., edit. by Amos, p. 26-27; *Id.* pp. 55, 125 *et seq.*, 136.

without the hazard of being deprived of them either by the king or any other."

The leading enactments in affirmance of Fortescue's proposition here recur to mind:—The 12th chapter of the Magna Carta of King John enacts that "no scutage or aid shall be imposed in our kingdom, unless by the common council of our kingdom, except to redeem our person and to make our eldest son a knight, and once to marry our eldest daughter, and for these there shall only be paid a reasonable aid;" and the 14th chapter of the same Charter sets forth that "for the holding the common council of the kingdom to assess aids (except in the three cases aforesaid) and for the assessing of scutages (*q*), we will cause to be summoned the archbishops, bishops, abbots, earls, and great barons of the realm, singly, by our letters; and, furthermore, we will cause to be summoned in general by our sheriffs and bailiffs all others who hold of us *in capite* at a certain day, that is to say, forty days before their meeting at least, and to a certain place, and in all letters of such summons we will declare the cause of the summons. And, summons being thus made, the business shall proceed on the day appointed according to the advice of such as shall be present, although all that were summoned come not." True it is that in the Charter of Henry III. the foregoing clauses were omitted; but the 5th and 6th chapters of the *Confirmatio Cartarum* (*r*) declare that voluntary aids towards the prosecution of the wars shall not be drawn into a precedent—that aids, save such as were due and accustomed, should not thenceforth be taken but by the common assent of the realm. Fur-

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(*q*) 2 Steph. Com. 559.

(*r*) 25 Edw. 1.

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MONEY.

The king
cannot alter
the law.

ther, the statute *De Tallagio non concedendo* (34 Edw. I.) enacts (c. 1), that "no tallage or aid shall be taken or levied by us or our heirs in our realm without the good will and assent of the archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the land." The Petition of Right is directed *inter alia* against any charge being laid upon the subject "without common consent by Act of Parliament" (s). And the Bill of Rights, reciting, amongst other illegal acts, that money had been levied "for and to the use of the Crown by pretence of prerogative for other time and in other manner than the same was granted by parliament," declares that "levying money for or to the use of the Crown by pretence of prerogative without grant of parliament for longer time or in other manner than the same is or shall be granted, is illegal."

Clearly, then, by a series of Declaratory Acts extending through five centuries, a check was from time to time attempted to be put upon an exercise by the Crown of one asserted branch of its prerogative—that of altering established law—which was most often put into activity with a view to augment the royal revenue out of the property of the subject, and hence one argument is drawn, almost irresistible, against the constitutional right of the sovereign thus to legislate for or tax the public.

Illegal practices of
Crown.

The most dangerous and audacious inroads, however, by the sovereign on the property of the subject have been made by him in his executive capacity. By fiscal regulations—by writs issued to the sheriffs of counties—by peremptory instructions to the judges or ecclesiastics, did the Crown, at various

periods, especially during the seventeenth century, strive to enforce in practice that arbitrary power to which in theory it laid claim. By forced exactions of money under the name of benevolences and loans —by arbitrary taxation of imports—by the notorious device of ship-money, was the attempt made; by the determined opposition of parliament and of the people was it ultimately and signally defeated.

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Illegal prac-
tices of
the Crown.

Before examining in detail the shifts resorted to by successive sovereigns for effecting the object specified, it may be well to epitomize what is said by Sir E. Coke (t) touching the various pecuniary assessments upon the subject for the benefit of the Crown known to, and acknowledged by, our law in the earliest times.

Lawful as-
sessments
for benefit
of the
Crown.

The general term subsidies, he says, or aids granted by parliament, were either, I., perpetual, or, II., temporary.

I. Perpetual subsidies included (1) the *custuma antiqua sive magna*, which was a custom or duty originally granted by parliament (u) to King Edward I., his heirs and successors, upon the export or import of wool, woolfels, and leather; (2) the *custuma parva et nova*, granted anno 31 Edw. I., in consideration of certain privileges, by the merchant strangers to the king and his heirs, *ultra antiquam custumam*.

Perpetual
subsidies.

Anciently, no duty save for wool, woolfels, or leather was paid by the home or foreign merchant (v). In the reign of Edward III., indeed, much of the wool for which custom had thus been granted and paid, having been manufactured into broadcloth, a question arose whether,

(t) 4 Inst. 28 *et seq.*; *et vide* 2 Inst. 77; 12 Rep. 33; *Sheppard v. Hartnold*, Vaugh. 159; Com. Dig. Prerogative (D. 43, D. 44).

Generally as to the revenue of the Crown, see 2 Steph. Com. chap. 7.

(u) 4 Inst. 29; see 25 Edw. 1, c. 7.

(v) 12 Rep. 33.

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upon export of the manufactured material, duty proportioned to the amount of wool contained therein should be paid, and it was resolved that no custom should in this case be paid, because the wool by the labour and industry of man had been changed into another kind of merchandize. The export of wool, however, having afterwards been prohibited by statute (*x*), a subsidy was granted by parliament of broad cloth in the 21st year of Edward III.

Besides the above customary payments, the Crown was entitled to butlerage—being a charge of two shillings on every tun of wine imported into the kingdom by merchant strangers; and to prisage, a custom duty, payable by English merchants, of twenty shillings for one tun before, and another behind the mast, in respect of every ship having twenty tuns of wine or more on board (*y*).

In addition moreover, to such statutory and customary dues, the Crown enjoyed the following prerogatives, tending to ease its pecuniary burthens or to augment its revenues:—

Purveyance
and Pre-
emption.

The prerogative of purveyance and pre-emption was a right asserted and jealously insisted on (*z*) by the Crown, of buying up provisions and other necessities without their owner's consent, through the intervention of the king's purveyors, for the use of his royal household, at an appraised valuation, and in preference to all others; also of forcibly impressing the carriages and horses of his subjects to do the king's business on the public roads, however inconvenient to the proprietor, upon paying him

(*x*) 11 Edw. 3, c. 1; see also 27 Edw. 3, cc. 3, 7, 27.

(*y*) Com. Dig. Prerogative (D. 45).

(*z*) See, for instance, the account of

the contention between Queen Elizabeth and her Commons in regard to the exercise of this prerogative, Hume, Hist. Eng. vol. v. pp. 346, 347.

a settled price (a). "The king," wrote Fortescue (b) in the reign of Henry VI., "by his purveyors, may take for his own use necessities for his household, at a reasonable price, to be assessed at the discretion of the constables of the place, whether the owners will or not; but the king is obliged by the laws to make present payment, or at a day to be fixed by the great officers of the king's household."

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In early times, remarks a judicious modern writer (c), the king's household was supported by specific renders of corn and other victuals from the tenants of the respective demesnes, and there was also a continual market kept at the palace gate to furnish viands for the royal use (d). This answered all purposes so long as the king's court continued in any certain place; but when the court removed from one part of the kingdom to another, as frequently happened, it was found necessary to send purveyors beforehand to get together a sufficient quantity of provisions and other necessities for the household, and these purveyors, in process of time, greatly abused their authority, and caused great oppression to the subject.

To repress such abuses, and to regulate the exercise of the king's prerogative of purveyance, statutes were from time to time enacted. By the Great Charter (e) of King John, it is declared that "no constable or other bailiff of ours shall take corn or other chattels of any man unless he presently gives him money for it, or hath respite

(a) 2 Steph. Com. 538.

(b) De Laud. Leg. Ang., by Amos, 134; and authorities cited *Ibid.*, note (c).

(c) 2 Millar, Eng. Gov., p. 415; *et vide* 2 Reeves, Hist. Eng. Law, Ed. 1869, p. 251.

(d) 2 Inst. 542.

(e) Chap. 28. See also chaps. 30 and 31, which declare that a man's horses, carts, or timber shall not, without his consent, be taken by any bailiff or officer of the Crown.—9 Hen. 3, cc. 19, 21.

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of payment from the seller." By the *Articuli super Cartas* (f), c. 2, after reciting that "there is a great grievance in this realm, and damage without measure, for that the king and the ministers of his house" "do make great prises when they pass through the realm, and take the goods, as well of clerks as of lay-people, without paying them for anything, or else much less than the value," it is ordained that "from henceforth none do take any such prises within the realm, but only the king's takers and the purveyors of his house," who are required to have with them their warrant, "the which warrant they shall show unto them whose goods they take before they take anything," and "shall take no more than is needful or meet to be used for the king, his household, and his children." By the statute *De Tallagio non concedendo* (g), it was provided that "no officer of ours, or of our heirs, shall take corn, leather, cattle, or any other goods of any manner of person without the good-will and assent of the party to whom the goods belong." And by the stat. 25 Edw. 3, st. 5, c. 1 (h), it was further provided that corn and victuals taken for the king's use should be appraised at their rightful value (i).

Statutory regulations, however, in regard to the exercise of this branch of the prerogative would seem to have been unavailing, for in the parliamentary remonstrance

(f) 28 Edw. 1.

(g) 34 Edw. 1, c. 2.

(h) See also 4 Edw. 3, cc. 3 and 4 ; 5 *Id.* c. 2 ; 10 *Id.* st. 2 ; 14 *Id.* st. 1, c. 19 ; 28 *Id.* c. 12 ; 34 *Id.* cc. 2 and 3 ; 36 *Id.* st. 1, cc. 2—6.

(i) Lord Coke, commenting upon the *Articuli super Cartas*, observes that by the laws and statutes of the realm five restrictions were imposed

upon the king's purveyors, with a view to mitigating the evils caused in the performance of their functions, viz., that they should take (1) only for the king's household, (2) with the consent of the owner, (3) at the market price, (4) no more than might be necessary, (5) where it might best be spared ; 2 Inst. 543.

anno 5 Ric. II. is set forth that the Commons were from time to time "pillaged and ruined, partly by the king's purveyors of the household and others, who pay nothing for what they take—partly by the subsidies and tallages raised upon them" (*k*).

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Notwithstanding the greatness of the mischief thus insisted on, and the urgent language of the Commons, the Crown continued to enjoy this peculiar privilege of purveyance, which originally enured to it in virtue of its feudal sovereignty, till A.D. 1660, when, having fallen into disuse during the Commonwealth, the prerogative was relinquished by the stat. 12 Car. 2, c. 24 (*l*), intitled, "An Act for taking away the Court of Wards and Liveries and Tenures *in Capite*, and by Knights' Service and Purveyance, and for settling a Revenue upon his Majesty in lieu thereof."

II. Subsidies granted to the Crown by parliament were of two kinds :—

Parliamentary sub-
sidies.

(1.) Tonnage and poundage granted to the sovereign originally for years, though afterwards for life (*m*), "for

Tonnage and
poundage.

(*k*) See also 23 Hen. 6, c. 1; 2 & 3 Edw. 6, c. 3.

(*l*) Chitt. Pre. Cr. p. 213.

(*m*) In 12 Rep. 34, we read as follows: "At the beginning of the reigns of kings it hath for a long time been used by authority and consent of parliament to grant to the king certain subsidies of tonnage and poundage for term of his life, which began in such form 2 & 3 Hen. 5, in the 31 Hen. 6, c. 8, and 12 Edw. 4, c. 3, for the defence of the realm and maintenance of certain wars by Act of Parliament, which proves that the king by his own power cannot impose

it but by consent of parliament."

Sir W. Blackstone (1 Com. 316—7) says that from the time of Henry 6 till that of Charles I the above duties were granted for life; but the last-named sovereign unconstitutionally levied them for many years without the consent of parliament.

So James 2, on his accession, issued a proclamation ordering the customs and excise to be paid to him as they had been to his predecessor—this assumption of power by him being clearly illegal.—Hume, Hist. Eng., vol. viii. p. 216.

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the keeping and safeguard of the seas, and for intercourse of merchants, safely to come into this realm, and safely to pass out of the same." Poundage was an *ad valorem* duty upon dry goods, at specified rates, and tonnage was payable upon wine imported into or exported from the kingdom.

Aids.

(2.) Aids were granted by parliament to the Crown, leviable on the land and goods of the subject, after certain fixed rates, "to such ends and for such considerations," and to be paid at "such times" as in the Act granting the subsidy might appear.

Tenths and fifteenths were temporary aids issuing out of personal property, granted to the king by parliament. Such an aid formerly signified the real tenth or fifteenth part of all moveables or personalty belonging to the subject (*n*). Tenths are said to have been first granted under Henry II., though afterwards fifteenths were more usually granted. Further, the amount of these taxes was originally uncertain,—they were levied by assessments made at every fresh grant by the Commons. In the 8 Edw. III., however, by virtue of commissions issued by the Crown into every county, a new taxation was made, and recorded in the Exchequer, of every city, borough, and town in England; and from that date, when a fifteenth had been granted by parliament, the inhabitants of each city or borough rated themselves for payment thereof according to the scale of assessment predetermined, and returned the amount when raised into the Exchequer (*o*).

Besides these legitimate methods of supplying the pecuniary requirements of the sovereign, others very

(*n*) 2 Steph. Com. 557.

(*o*) 2 Inst. 77; 2 Steph. Com. 558.

questionable in their nature were adopted, of which may be mentioned benevolences, forced loans, and the infliction of excessive fines.

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Benevo-
lences.

The practice of raising money under the semblance of a voluntary loan, or benevolence, was occasionally resorted to by our kings ; for instance, by Henry III., Richard II., and Edward IV. (*p*). The last-named monarch, observes Lord Coke (*q*), had a subsidy granted him by parliament in the twelfth year of his reign, and "because he could have no more by parliament, and without a parliament he could not have any subsidy to be levied of the lands and goods of the subject, he invented this shift or device." In prospect of a war with France, the king called before him the wealthiest of his subjects to declare to them his necessity—his purpose to levy war for the safety of the kingdom, and demanded of each of them a sum of money. The expedient was successful, and was resorted to by succeeding sovereigns (*r*).

Against the compulsory collection of benevolences, statutes (*s*) were from time to time enacted, and the gross exactions enforced by Empson and Dudley during the reign of Henry VII. (*t*), brought upon those offenders condign punishment on the accession of his son. Long after this period, however, it was insisted (*u*) that

(*p*) Hume, Hist. Eng., vol. iii. p. 253 ; 2 Millar, Eng. Gov., pp. 410-413.

(*q*) 12 Rep. 119,

(*r*) 12 Rep. 120.

(*s*) See particularly 1 Ric. 3, c. 2, the preamble of which points at "a new imposition called a benevolence, whereby divers years the subjects and Commons of this land, *against their wills* and freedoms, have paid great

sums of money to their almost utter destruction ;" and the body of which enacts that the king's subjects shall thenceforth "in no wise be charged by none such charge, exaction, or imposition called a benevolence, nor by such like charge."

(*t*) See Bacon's Life of Hen. 7, p. 217.

(*u*) Note by Mr. Hargrave, 2 St. Tr. 899.

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gifts to the Crown out of parliament, if really voluntary, were lawful; and, according to Lord Coke (*v*), so late as the 4th year of Queen Elizabeth, it was resolved by all the judges that a free grant to the queen without coercion was lawful. In the *Case of Mr. St. John* (*w*), before the Star Chamber, a severe judgment was passed on the accused by that arbitrary tribunal for writing and publishing a paper against a benevolence collected in the 13th James I., under the authority of the Privy Council only, without the consent of parliament; and Lord Bacon, in his speech for the prosecution, on an information, *ore tenus*, by him as Attorney-General, there lays great stress on the fact that the benevolence in question was not compulsory. There was no proportion, he says, or rate of contribution indicated—there was no menace of any that should refuse to pay it, no reproof of any that did refuse, no certifying of the names of any who resisted payment. And, further, Lord Bacon insists on the difference between a benevolence and an imposition or exaction called a benevolence—between that which “the subject of his good-will would give,” and that which “the king of his good-will would take.”

Forced
loans.

Under King Charles I. forced loans, as we have already seen (*x*), led to the proceedings in *Darnel's Case*, and to the debates in parliament concerning the liberty of the subject. Sir E. Coke on that occasion declared (*y*) that “the king cannot tax any by way of loans,” and in support of his opinion cited a Petition of the Commons (*z*)

(*v*) 12 Rep. 120.

(*w*) 2 St. Tr. 899.

(*x*) *Ante*, p. 158. See also the proceedings against Archbishop Abbot for refusing to license Dr. Sibthorp's sermon in furtherance of a loan, and in

justification of the imposition of taxes by the Crown without consent of parliament, A.D. 1627.—2 St. Tr. 1449.

(*y*) 3 St. Tr. 63.

(*z*) 1 Cobbett, Parl. Hist., p. 117.

(A.D. 1352), "worthy to be written in letters of gold," that "loans against the will of the subject are against reason and the franchises of the land." "The lord," he said, "may tax his villein high or low, but it is against the franchises of the land for freemen to be taxed but by their consent in parliament." Conformably to this opinion, the Petition of Right, after setting forth that by authority of parliament in the 26th Edw. III. (a), "it is declared and enacted that from thenceforth no person should be compelled to make any loans to the king against his will, because such loans were against reason, and the franchise of the land; and by other laws of this realm it is provided that none should be charged by any charge or imposition called a benevolence, nor by such like charge," complains as follows:—

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"Yet nevertheless, of late, divers Commissions, directed to sundry commissioners in several counties, with instructions, have issued; by means whereof your people have been in divers places assembled and required to lend certain sums of money unto your Majesty, and many of them, upon their refusal so to do, have had an oath administered unto them, not warrantable by the laws or statutes of this realm, and have been constrained to become bound to make appearance, and give attendance before your Privy Council, and in other places; and others of them have been therefore imprisoned, confined, and sundry other ways molested and disquieted. And divers other charges have been laid and levied upon your people in several counties, by lords lieutenants, deputy lieutenants, commissioners for musters, justices of peace, and others by command and direction from your Majesty,

(a) *Et vide* Rot. Parl. vol. ii. p. 238, No. 11.

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or your Privy Council, against the laws and free customs of this realm."

And the Petition accordingly prays in this behalf (1), "That no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by Act of Parliament; and (2), that none be called to make answer, or take such oath, or to give attendance, or be confined, or otherwise molested or disquieted concerning the same, or for refusal thereof."

The compulsory collecting of money by the Crown, whether as a loan or a benevolence, was thus explicitly declared to be illegal, and at a later period was supplied a seeming deficiency in the statute of Richard III. (*b*), and the Petition of Right by the 13 Car. 2, c. 4 (*c*), which authorised the king to issue commissions under the Great Seal, for receiving voluntary subscriptions from his subjects, and which declared that no commissions or aids of that nature can be issued or levied but by consent of parliament. The aim of this statute, Mr. Hargrave observes (*d*), was to condemn benevolences by solicitation of commissioners appointed by the Crown, and to affirm not merely that compulsory benevolences are unlawful, but that all commissions from the Crown to solicit and receive voluntary gifts are also unconstitutional; that the king cannot legally thus invade the property of the subject under the specious pretext that he does

(*b*) Cited *ante*, p. 395, n. (*s*).

(*c*) This statute authorised the king to issue commissions under the great seal, for receiving voluntary subscriptions for the supply of his occasions; but limited commoners to 200*l.* and peers to 400*l.* each, as also the time

for subscribing; and concludes by declaring, that no commissions or aids of this nature can be issued out or levied but by authority of parliament.

(*d*) Prefatory remarks to *Mr. St. John's Case*, 2 St. Tr. 900.

so with the subject's consent—for a formal solicitation from the Crown is almost tantamount to compulsion—and a request by its commissioners or agents might be so worded or conveyed as to be equivalent to a command.

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Fines, &c.

The king, by virtue of his prerogative, was entitled to all fines and amercements (*e*) and penalties, either wholly or in part (*f*), and, to prevent the undue exercise of this prerogative, various statutory restrictions were imposed. Thus, the fourteenth chapter of Henry III.'s Magna Carta (*g*) declares that "a freeman shall not be amerced for a small fault, but after the manner of the fault—and for a great fault after the greatness thereof—saving to him his 'contentment,' and a merchant likewise—saving to him his merchandize." We must understand this word "contentment" to signify that which is necessary for the support and maintenance of a man in his state or condition of life. And, thus, this well-known chapter of Magna Carta forbids the setting upon any man of an amercement heavier than his circumstances or estate would bear—saving, as Lord Coke says, in his commentary on this passage (*h*), to the soldier his armour, to the scholar his books, and to the villein the cart or wainage with which his ignoble service was performed. That such is the true meaning of Magna Carta may be inferred, *inter alia*, from the Statute of Westminster, I., 3 Edw. 1, c. 6,

(*e*) An amercement differed from a fine in this respect, that the former was assessed by the country, whereas the latter was imposed by the Court. — *Griesley's Case*, 8 Rep. 39 a. Again: "Fines are said to be punishments certain, and grow expressly from some statute; but amercements

are such as are arbitrarily imposed," —Toml. Law Dict. *ad verb*, "Amercement;" *et vide Godfrey's Case*, 11 Rep. 43 b, 44 a.

(*f*) Com. Dig. Prerogative (D. 54 b, 55, 58, 60).

(*g*) *Vide* Mag. Cart. of John, c. 20.

(*h*) 2 Inst. 28.

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which enacts that no man be amerced without reasonable cause, and according to the quantity of his trespass, that is to say, every freeman, saving his freehold—a merchant, saving his merchandize—and a villein, saving his wainage.

Magna Carta, as remarked by Lord Coke (*i*), “extends to amercements, and not to fines imposed by any Court of Justice.” Within the spirit and equity, however, of this enactment, fines imposed judicially must certainly be brought; such fines ought to be moderate and “within bounds” (*k*), for “where a court has a power of setting fines, that must be understood of setting reasonable fines” (*l*): an excessive fine “is against law, and shall not bind, for *excessus in re quâlibet jure reprobatur communi*” (*m*). And accordingly the counsel for Mr. Hampden (*n*), who was convicted of a misdemeanour *anno* 36 Car. II., urges upon the court in mitigation of punishment, that his client was possessed but of a moderate estate, and that according to Magna Carta, “there should be a *salvo contenemento* in all fines.” So in *O’Connell v. Reg.* (*o*), Lord Campbell refers to Magna Carta as providing that “no fine shall be imposed beyond what the party is able to pay.”

On many occasions which the reader of history will call to mind—especially during the seventeenth century (*p*)—were ruinous fines inflicted in violation of law, as well by the Star Chamber as by the Superior Courts; and hence the declaration in the Bill of Rights that “excessive fines

(*i*) 2 Inst. 27; 8 Rep. 39 b, 40 a.

(*k*) 1 St. Tr., Pref. by Mr. Emlyn,
p. xxxv.

(*l*) *Id. ibid.*, cited 8 Rep. 38 b.

(*m*) *Godfrey’s Case*, 11 Rep. 44 a.

(*n*) 9 St. Tr. 1054, 1124.

(*o*) 11 Cl. & F. 406.

(*p*) See, for instance, *J. Hampden’s Case*, 9 St. Tr. 1053, 1126; *Sir S. Barnardiston’s Case*, *Id.*, 1333, 1371; *Earl of Devonshire’s Case*, 11 St. Tr. 1353, 1357, 1370; *Williams’s Case*, 13 St. Tr. 1436.

ought not to be imposed" (q), grounded on the averment (r) that such had been the practice in the reign of King James II., who in this and other ways, "by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavour to subvert and extirpate the laws and liberties of this kingdom" (s).

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More dangerous even to the subject than any of the un-constitutional acts already noticed were those the nature of which appears from our Leading Cases, for if the sovereign could *proprio vigore* by his letters patent, impose taxes upon imports, and if, in accordance with the answers given by subservient judges to the questions *ante* (t), payment of sums assessed for the service of the Crown at its pleasure could be enforced against the subject, not only would the subject's right of property be rudely shaken, but his personal liberty would be exposed to the extremest peril.

Remarks on
the Prin-
cipal Cases.

Perhaps the most weighty arguments urged against the prerogative in the Principal Cases are as follows:—

I. As to the right of the Crown to impose duties at the ports. Admitting that custom is due by the common law, it must, like other revenues accorded to the Crown, be certain, or reducible to a certainty, by some legal course. If an offensive war be contemplated, aid may be obtained from parliament, and subjects holding under military tenures would be bound to serve. Should a defensive war be necessitated by reason of invasion, "every subject within the land, high and low, whether he hold of

Arguments
against the
right to
impose.

(q) Enactment, 10.

(r) Preamble, 11.

(s) The practice of imposing exorbitant fines is mentioned by Sir John Hawles, Solicitor-General to King

William III., as the first of six "reasons for the disaffection of the nation to the late Government," 9 St. Tr. 426.

(t) Page 305.

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the king or not, may be compelled, at his own charge, to serve the king in person" (u).

An increase of the customs has, when needed, been obtained by our kings since the time of Henry III. by grant from parliament, or by way of loan from merchants, or in consideration of liberties and immunities conceded to traders, or under the colour of grants from merchants.

From the Conquest until the reign of Queen Mary not more than six impositions resembling that before us were laid by the sovereign, and these were tolerated only because they were moderate in amount, laid in times of great necessity, and to endure for a very short period. Each of such impositions, nevertheless, was complained of, and upon complaint was taken away.

The impositions laid by Queen Mary in excess of what had been granted to her by parliament were complained of in the first year of Queen Elizabeth (x), and "no sanction, judicial or extrajudicial, was ever obtained" in her reign for this excess of the prerogative (y).

Lastly. The king's power to impose, even if it existed at common law (z), was expressly taken away by statute (a).

Arguments
against the
levying of
ship-money.

II. Regarding the right of the Crown to levy ship-money, the main inquiry must be, whether the method adopted was in conformity with our law and constitution. Now the methods provided at common law for defence of the realm, whether by sea or land, were, 1st, by tenure of

(u) *Ante*, p. 257. Chit. Pre. Cr. p. 18; Fost. Cr. L. 158.

(x) Dyer, 164.

(y) *Per* Mr. Hargrave, 2 St. Tr. 377, 378; 1 Hall. Const. Hist. Eng., pp. 316, 317.

(z) "The king cannot charge the subject with an imposition where he has no benefit by it, or a *quid pro quo*." Com. Dig. Prerogative (D. 48): see Chitt. Pre. Cr. 386.

(a) *Ante*, pp. 285, *et seq.*

land; 2ndly, by certain prerogatives vested in the Crown, and the profits and emoluments, such as wards, marriages, escheats, and forfeitures thence resulting; 3rdly, by particular supplies of money for defence of the sea in time of danger, *sc.*, the great and petty customs, aids, subsidies, tonnage and poundage, and the service of the Cinque Ports. In extraordinary emergencies our kings have either had recourse to parliament, or have obtained supplies of money (1) by loans and benevolences, (2) by anticipating their revenues; but prior to the time of Charles I. had on no occasion asserted a prerogative claim to ship-money. Other arguments against the claim are founded (1) on express statutes (*b*), which in various ways provide for the defence of the realm, (2) on the constitutional principle that the king cannot, without his consent, take away the property of the subject (*c*).

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levying of
ship-money.

Of the prerogatives respectively asserted by James I. and his son to impose and to levy ship-money, each was in turn successfully resisted and annulled. Against the former, as we have already seen (*d*), the Commons most urgently remonstrated, and by successive statutes it was altogether repudiated and denied. For the stat. 16 Car. 1, c. 8, granting tonnage and poundage to the king, declared and enacted as follows:—That “it is and hath been the ancient right of the subjects of this realm that no subsidy, custom, impost, or other charge whatsoever, ought [to] or may be laid or imposed upon any merchandize exported or imported by subjects, denizens or aliens, without common consent in parliament.” Moreover, as observed by Mr. Hargrave (*e*), “One of the first Acts (*f*)

(*b*) Enumerated, *ante*, pp. 322, *et seq.*

(*c*) *Ante*, p. 231.

(*d*) *Ante*, p. 299.

(*e*) 2 St. Tr. 373.

(*f*) 12 Car. 2, c. 4, s. 6.

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after the Restoration was a grant of tonnage and poundage, with words which renewed a part of the former declarations against taxing by prerogative; for it anxiously recited, that 'no rates can be imposed on merchandize imported or exported by subjects or aliens, but by common consent in parliament.'" And the Bill of Rights, as we have previously shown, emphatically declared against all prerogative taxation (*g*).

The asserted right of the Crown to levy ship-money was extinguished by the stat. 16 Car. 1, c. 14 (*h*), and is likewise refuted by the language of the Bill of Rights.

Conclusion.

Such being the signal triumph of constitutional principles over doctrines irrational and oppressive, this Note may fittingly conclude with the remarkable language of Lord Hale (*i*), who says, "It is a thing most certain and unquestionable, by the law of England," that "no common aid or tax can be imposed upon the subjects, without consent in parliament; and no dispensation or *non obstante* can avail to make it good or effectual; no, not for the maintaining of a military force, though in case of necessity. And that man that will teach, that in all these cases a tacit condition is implied, to let loose laws of this importance, and to subject the estates and properties of the subjects to arbitrary impositions, notwithstanding the solemnest engagements to the contrary—1. Takes upon him to be wiser than the king himself, who hath not only granted, but judged the contrary—2. Takes upon him to be wiser than all the estates of the kingdom, as neither

(*g*) *Ante*, p. 388. As regards the right of the Crown to levy taxes on a conquered country, see *Campbell v. Hall*, 20 St. Tr. 239, cited *ante*, p. 51.

(*h*) *Ante*, p. 366.

(*i*) See his "Reflections on Mr. Hobbes's Dialogue of the Law," cited by Mr. Hargrave, 2 St. Tr. 379.

just or prudent advisers for the good and safety of the kingdom—3. Goes about to break down the security of all men's properties and estates—4. Doth mischievously insinuate jealousies in the minds of men, as if all the laws of the kingdom might be abrogated, when the king pleaseth ; and thereby does the king and his government more mischief than he can ever recompense."

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—

THE CASE OF THE SEVEN BISHOPS (*k*), 12 St. Tr. 183 (*l*).

(4 Jac. 2, A.D. 1688.)

RIGHT OF THE CROWN TO DISPENSE WITH EXISTING LAWS.

The sovereign cannot, of his own authority, dispense with existing laws. It is the right of every subject of the realm to petition.

In the reign of James II. various statutes of an oppressive character, affecting such as were not members of the Church of England, were in operation (*m*). On April 4th, 1687, the king issued a declaration, as follows—that none of these laws were to be put in execution:—

First declaration of indulgence—4 April, 1687.

“It having pleased Almighty God, not only to bring us to the imperial crowns of these kingdoms through the greatest difficulties, but to preserve us by a more than ordinary providence, upon the throne of our royal ancestors, there is nothing now that we so earnestly desire, as to establish our government on such a foundation as may make our subjects happy, and unite them to us by inclination as well as duty, which we think can be done by no means so effectually, as by granting to them the free exercise of their religion for the time to come, and add that to the perfect enjoyment of their property, which has never been in any case invaded by us since our coming to the crown; which being the two things men value most, shall ever be preserved in these kingdoms during our

(*k*) Sancroft, Archbishop of Canterbury; Lloyd, Bishop of St. Asaph; Turner, Bishop of Ely; Lake, Bishop of Chichester; Kenn, Bishop of Bath and Wells; White, Bishop of Peterborough; Trelawney, Bishop of Bristol.

(*l*) S. C., 3 Mod. 212.

(*m*) Uniformity Acts, 1 Eliz., c. 2; 13 & 14 Car. 2, c. 4; Corporation Act, 13 Car. 2, stat. 2, c. 1; Five Mile Act, 17 Car. 2, c. 2; Conventicle Act, 16 Car. 2, c. 4; 22 Car. 2, c. 1; Test Act, 25 Car. 2, c. 2.

reign over them, as the truest methods of our peace, and our glory. We cannot but heartily wish, as it will easily be believed, that the people of our dominions were members of the Catholic Church, yet we humbly thank Almighty God, it is, and hath long time been our constant sense and opinion (which upon divers occasions we have declared), that conscience ought not to be constrained, nor people forced in matters of mere religion. It has ever been directly contrary to our inclination, as we think it is to the interest of government, which it destroys by spoiling trade, depopulating countries, and discouraging strangers; and finally, that it never obtained the end for which it was employed. And in this we are the more confirmed by the reflections we have made upon the conduct of the four last reigns. For after all the frequent and pressing endeavours that were used in each of them, to reduce these kingdoms to an exact conformity in religion, it is visible, that success has not answered the design; and that the difficulty is invincible. We therefore, out of our princely care and affection unto all our loving subjects, that they may live at ease and quiet, and for the increase of trade, and encouragement to strangers, have thought fit, by virtue of our royal prerogative, to issue forth this our declaration [of indulgence, making no doubt of the concurrence of our two houses of parliament, when we shall think it convenient for them to meet. In the first place, we do declare, that we will protect and maintain our archbishops, bishops, and clergy, and all other our subjects of the Church of England, in the free exercise of their religion, as by law established, and in the quiet and full enjoyment of all their possessions, without any molestation or disturbance whatsoever. We do likewise declare, that it is our royal will and pleasure, that from henceforth the execution of all and all manner of penal laws in matters ecclesiastical, for not coming to church, or not receiving the sacrament, or for any other nonconformity to the religion established,

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or for or by the reason of the exercise of religion in any manner whatsoever, be immediately suspended, and the further execution of the said penal laws, and every of them is hereby suspended. And to the end that by the liberty hereby granted, the peace and security of our government, in the practice thereof, may not be endangered, we have thought fit, and do hereby straitly charge and command all our loving subjects, that as we do freely give them leave to meet and serve God after their own way and manner, be it in private houses, or places purposely hired or built for that use, so that they take special care that nothing be preached or taught amongst them which may any ways tend to alienate the hearts of our people from us or our government, and that their meetings and assemblies be peaceably, openly, and publicly held, and all persons freely admitted to them; and that they do signify and make known to some one or more of the next justices of the peace, what place or places they set apart for those uses. And that all our subjects may enjoy such their religious assemblies with greater assurance and protection, we have thought it requisite, and do hereby command, that no disturbance of any kind be made or given unto them, under pain of our displeasure, and to be further proceeded against with the uttermost severity. And forasmuch as we are desirous to have the benefit of the service of all our loving subjects, which by the law of nature is inseparably annexed to and inherent in our royal person, and that none of our subjects may for the future be under any discouragement or disability (who are otherwise well inclined and fit to serve us) by reason of some oaths or tests that have been usually administered on such occasions, we do hereby further declare, that it is our royal will and pleasure, that the oaths commonly called the oaths of supremacy and allegiance, and also the several tests and declarations mentioned in the Acts of Parliament made in the 25th and 30th years of the reign of our late royal brother King

Charles II., shall not at any time hereafter be required to be taken, declared, or subscribed by any person or persons whatsoever, who is or shall be employed in any office or place of trust, either civil or military, under us, or in our government. And we do further declare it to be our pleasure and intention, from time to time hereafter, to grant our royal dispensations under our great seal, to all our loving subjects so to be employed, who shall not take the said oaths, or subscribe or declare the said tests or declarations in the above-mentioned acts, and every of them. And to the end that all our loving subjects may receive and enjoy the full benefit and advantage of our gracious indulgence hereby intended, and may be acquitted and discharged from all pains, penalties, forfeitures, and disabilities by them or any of them incurred or forfeited, or which they shall or may at any time hereafter be liable to, for or by reason of their nonconformity or the exercise of their religion; and from all suits, troubles or disturbances for the same; we do hereby give our free and ample pardon unto all nonconformists, recusants, and other our loving subjects for all crimes and things by them committed or done, contrary to the penal laws formerly made relating to religion, and the profession or exercise thereof; hereby declaring, that this our royal pardon and indemnity shall be as good and effectual to all intents and purposes, as if every individual person had been therein particularly named, or had particular pardons under our great seal, which we do likewise declare shall from time to time be granted unto any person or persons desiring the same; willing and requiring our judges, justices, and other officers, to take notice of and obey our royal will and pleasure herein-before declared. And although the freedom and assurance we have hereby given in relation to religion and property, might be sufficient to remove from the minds of our loving subjects all fears and jealousies in relation to either; yet we have thought fit further to declare, that we will maintain them in all

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their properties and possessions, as well of church and abbey lands, as in any other their lands and properties whatsoever."

Nothing having been actually done to give effect to the foregoing declaration, the king on April 27th, in the following year, issued another in the terms following:—

Second de-
claration of
indulgence
—27 April,
1688.

"Our conduct has been such in all times, as ought to have persuaded the world, that we are firm and constant to our resolutions; yet, that easy people may not be abused by the malice of crafty, wicked men, we think fit to declare, that our intentions are not changed since the 4th of April, 1687, when we issued out our declaration for liberty of conscience in the following terms:—

[Here followed a copy of the previous declaration.]

"Ever since we granted this indulgence, we have made it our principal care to see it preserved without distinction, as we are encouraged to do daily by multitudes of addresses, and many other assurances we received from our subjects of all persuasions, as testimonies of their satisfaction and duty, the effects of which we doubt not but the next parliament will plainly show; and that it will not be in vain that we have resolved to use our uttermost endeavours to establish liberty of conscience on such just and equal foundations as will render it unalterable, and secure to all people the free exercise of their religion for ever; by which future ages may reap the benefit of what is so undoubtedly for the general good of the whole kingdom. It is such a security we desire, without the burthen and constraint of oaths and tests, which have been unhappily made by some governments, but could never support any. Nor should men be advanced by such means to offices and employments, which ought to be the reward of services, fidelity and merit. We must conclude, that not only good Christians will join in this, but whoever is concerned for the increase of the wealth and power of the nation. It would perhaps prejudice some of our neighbours, who might lose part of those vast

advantages they now enjoy, if liberty of conscience were settled in these kingdoms, which are above all others most capable of improvements, and of commanding the trade of the world. In pursuance of this great work, we have been forced to make many changes both of civil and military offices throughout our dominions, not thinking any ought to be employed in our service, who will not contribute towards the establishing the peace and greatness of their country, which we most earnestly desire, as unbiassed men may see by the whole conduct of our government, and by the condition of our fleet, and of our armies, which, with good management, shall be constantly the same, and greater, if the safety or honour of the nation require it. We recommend these considerations to all our subjects, and that they will reflect on their present ease and happiness, how for above three years, that it hath pleased God to permit us to reign over these kingdoms, we have not appeared to be that prince our enemies would have made the world afraid of; our chief aim having been not to be the oppressor, but the father of our people, of which we can give no better evidence than by conjuring them to lay aside all private animosities, as well as groundless jealousies, and to choose such members of parliament as may do their part to finish what we have begun, for the advantage of the monarchy over which Almighty God hath placed us, being resolved to call a parliament, that shall meet in November next at farthest."

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Second declaration of
indulgence.

A week after the above proclamation (May 4th, 1688), the following Order in Council was issued:—

"It is this day ordered by his Majesty in Council, that his Majesty's late gracious declaration, bearing date the 27th of April last, be read at the usual time of divine service, upon the 20th and 27th of this month, in all churches and chapels within the cities of London and Westminster, and ten miles thereabout; and upon the 3rd and 10th of June next, in all other churches and

Order in
Council,
4 May, 1688.

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chapels throughout this kingdom. And it is hereby further ordered, that the right reverend the bishops cause the said declaration to be sent and distributed throughout their several and respective dioceses, to be read accordingly."

The above Order in Council was gazetted May 7th, allowing the bishops and clergy scarcely a fortnight for deciding as to the course they should pursue. Various meetings were, however, held, and letters were despatched to many of the bishops, requesting their presence in London to confer with the Archbishop of Canterbury. Of these letters some were intercepted (*n*), and of the prelates some were unable to attend; nevertheless on May 18th, a meeting of eminent divines took place at Lambeth, in pursuance of which a petition was prepared by the Archbishop in the following terms:—

"To the King's most excellent Majesty.

"The humble petition of William Archbishop of Canterbury, and of divers of the suffragan Bishops of that province, now present with him, in behalf of themselves and others of their absent brethren, and of the Clergy of their respective Dioceses,

"Humbly sheweth; that the great averseness they find in themselves to the distributing and publishing in all their churches your Majesty's late declaration for liberty of conscience, proceedeth neither from any want of duty and obedience to your Majesty—(our holy mother, the Church of England, being both in her principles, and in her constant practice, unquestionably loyal, and having, to her great honour, been more than once publicly acknowledged to be so by your gracious Majesty),—nor yet from any want of due tenderness to dissenters, in relation to whom they are willing to come to such a temper as shall be thought fit, when that matter shall be considered and settled in parliament and convocation.

(*n*) Clarendon's Diary, May 16th, 1688.

But among many other considerations, from this especially, because that declaration is founded upon such a dispensing power, as hath been often declared illegal in parliament, and particularly in the years 1662, and 1672, and the beginning of your Majesty's reign, and is a matter of so great moment and consequence to the whole nation, both in church and state, that your petitioners cannot in prudence, honour, or conscience, so far make themselves parties to it, as the distribution of it all over the nation, and the solemn publication of it once and again, even in God's house, and in the time of his divine service, must amount to, in common and reasonable construction.

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Petition of
the bishops.

"Your petitioners therefore most humbly and earnestly beseech your Majesty, that you will be graciously pleased not to insist upon their distributing and reading your Majesty's said declaration :—And your petitioners (as in duty bound) shall ever pray, &c." (o).

In the evening of the same day (May 18), the petition being finished, all the subscribers (except the archbishop, who had been forbidden the court almost two years before) went over to Whitehall to deliver it to the king. In order thereto the Bishop of St. Asaph went first to the Earl of Middleton (principal secretary), in the name of all the rest, to desire his assistance in introducing them to his Majesty ; but he had been ill for a fortnight before, and was confined to his chamber. Then St. Asaph (his brethren staying at the Earl of Dartmouth's house) went, and made the like application to the Earl of Sunderland,

Presenta-
tion of the
petition.

(o) Signed W. Cant. W. Asaph, Fran. Ely, Jo. Cicestr., Tho. Bath and Wells, Tho. Petriburgens., Jon. Bristol.

On two other copies of the above petition, one of which is in the archbishop's hand, are the following subscriptions :—

Approbo H. London, May 23, 1688.

May 23, William Norwich.

May 21, Robert Gloucester.

May 26, Seth Sarum.

P. Winchester.

Tho. Exon, May 29, 1688.

See 1 Gutch, *Collectanea Curiosa*, 337.

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desiring him to peruse the petition, and acquaint his Majesty with it, that he might not be surprised at the delivery of it; and withal to beseech his Majesty to assign the time and place, when and where the bishops might all attend him, and present their petition. The earl refused to inspect the petition, but acquainted the king with their desire; and they were presently brought to the king in his closet within his bed-chamber: where the Bishop of St. Asaph with the rest (all being upon their knees), delivered their petition to his Majesty. The king was pleased (at first) to receive the petitioners and their petition graciously, and upon the first opening of it to say, "This is my lord of Canterbury's own hand:" to which the bishops replied, "Yes, sir, it is his own hand." But the king, having read it over, and then, folding it up, told (*p*) them angrily, that he considered it a standard of rebellion, that God had given him the dispensing power and he would maintain it, and that there were seven thousand men of the Church of England who had not bowed the knee to Baal. He then dismissed them with threats.

The same evening the petition appeared in print in every part of London (*q*).

On the Sunday morning specified in the declaration it was read in four churches only throughout London and its neighbourhood, and thereupon from

(*p*) "Upon the reading of it the king startled, and showed himself to be very much incensed, and made this answer in a very angry manner: 'I have heard of this before, but did not believe it. I did not expect this from the Church of England, especially from some of you. If I change my mind, you shall hear from me; if not, I expect my command shall be obeyed.' The bishops replied, 'We

resign ourselves to the will of God'; and then immediately retired." Kennett, Hist. Eng., vol. 3, p. 511, 2nd ed.

(*q*) 2 Macaulay, Hist. Eng. 353. Burnet says this did not happen through any act of the bishops, but must have been done by some of those to whom the king showed it. 1 Burnet, Hist. of his own Times, 741; *vide* Oldmixon, 732.

each of such churches the congregation departed in disgust (*r*).

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Thus things for some time remained, until Sunday, May 27th, late in the evening of which day one of his Majesty's messengers served the Archbishop of Canterbury with the following summons, signed by Sunderland, the president of the council:—

The Bishops
summoned
to the
Council.

“These are in his Majesty's name to require William Lord Archbishop of Canterbury, to appear personally before his Majesty in council upon the 8th day of June next, at 5 o'clock in the afternoon, to answer to such matters of misdemeanor as on his Majesty's behalf shall then and there be objected against him; and you are hereby required to summon the said William Lord Archbishop of Canterbury to appear accordingly: and for so doing this shall be your warrant.”

As many of the petitioners as were in town (*viz.*, the Bishops of Ely, Chichester, and Peterborough) were at the same time served with the like summons by other of the king's messengers; and it was sent after the rest, who had gone home into their dioceses.

On Friday, June 8th, at 5 o'clock in the afternoon, his Majesty came into the privy council, and about half an hour afterwards the archbishop and six bishops who were attending in the next room, were called into the council chamber, and graciously received by his Majesty.

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in the Privy
Council.

The Lord Chancellor took a paper then lying on the table, and showing it to the archbishop, asked him in words to this effect—(*s*)

(*r*) 2 Rapin, 763; 3 Kennett, Hist. Eng. 511; 2 Macaulay, Hist. Eng. 355.

(*s*) Tindal, in a note to his translation of Rapin, says: “It seems as the Bishops were going to the council, they were advised to remember, that no man was obliged by the law to accuse himself. Accordingly, when

the king in council, holding the petition in his hand, asked them whether they had signed that paper? they made a low bow and said nothing. ‘What!’ says the king, ‘do you deny your own hands?’ Upon which they silently bowed again; then the king told them, if they would own it to be their hands, upon his royal word,

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“Is this the petition that was written and signed by your grace, and which these bishops presented to his Majesty?”

The archbishop received the paper from the Lord Chancellor, and addressing himself to his Majesty, said—

“Sir, I am called hither as a criminal; which I never was before in my life, and little thought I ever should be, especially before your Majesty: but since it is my unhappiness to be so at this time, I hope your Majesty will not be offended, that I am cautious of answering questions. No man is obliged to answer questions that may tend to the accusing of himself.”

His Majesty called this chicanery, and hoped he would not deny his hand.

The archbishop still insisted upon it, that there could be no other end of this question, but to draw such an answer from him, as might afford ground for an accusation; and therefore desired there might be no answer required of him. The Bishop of St. Asaph said, “All divines of all Christian churches agree in this, that no man in our circumstances is obliged to answer any such question.” The king still pressing for an answer with some seeming impatience, the archbishop said, “Sir, though we are not obliged to give any answer to this question, yet, if your Majesty lays your commands upon us, we shall answer it, in trust upon your Majesty’s justice and generosity, that we shall not suffer for our obedience, as we must, if our answer should be brought in evidence against us.” His Majesty said, “No; I will not command you; if you will deny your own hands, I know

not a hair of their heads should be touched; whereupon the Archbishop said, ‘Relying on your Majesty’s word, I confess it to be my hand.’ And so said all the rest. Then being ordered to withdraw, when they were called in again, they found the king vanished

and Jefferies in the chair; who, using them very roughly, sent them to the Tower. The translator had these particulars from the late Bishop of Durham’s own mouth.” 2 Rapin, 763, *note*.

not what to say to you," &c. The Lord Chancellor then said, "Withdraw." After about half a quarter of an hour they were called in again: then the Lord Chancellor said, "His Majesty has commanded me to require you to answer this question—whether these be your hands that are set to this petition?" His Majesty himself also said, "I command you to answer this question." Then the archbishop took the petition, and having read it over, said, "I own that I writ this petition, and that this is my hand." Then the Lord Chancellor asked each of the bishops; and they all acknowledged their hands, and that they delivered this petition. Then they were commanded to withdraw. After a while they were called in a third time, and were then told that a criminal information for libel would be exhibited against them in the King's Bench, and were called on to enter into recognizances. They refused to do so, insisting on their privilege as peers. They were threatened with being sent to the Tower if they persisted in their refusal, and this threat having no effect upon them, the following warrant was drawn up for their committal by the privy council:

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"These are in his Majesty's name and by his command to require you to take into your custody the persons of William Lord Archbishop of Canterbury, William Lord Bishop of St. Asaph, Francis Lord Bishop of Ely, John Lord Bishop of Chichester, Thomas Lord Bishop of Bath and Wells, Thomas Lord Bishop of Peterborough, and Jonathan Bishop of Bristol, for contriving, making, and publishing a seditious libel in writing, against his Majesty and his government, and them safely to keep in your custody, until they shall be delivered by due course of law: for which this shall be your sufficient warrant. At the Council Chamber in Whitehall, this 8th day of June, 1688.

Warrant of
Commit-
ment.

"To the Lieutenant of the Tower of London."

[Signed by Jefferies, Sunderland, and several other members of the privy council].

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The seven bishops were accordingly sent to the Tower by water, and kept there till the first day of term (June 15th), when they were brought before the King's Bench for trial.

Trial in
King's
Bench.

The presiding judges were Sir Robert Wright, C.J. (*t*), Holloway, J. (*u*), Powell, J. (*v*), and Allybone, J. (*w*). The counsel for the Crown were Sir Thomas Powis, A.G., Sir William Williams, S.G., Sir Bartholomew Shower (Recorder of London), Serjt. Baldock, Serjt. Trinder, and Mr. Wright. For the defendants, Sir Robert Sawyer, Mr. Finch, Sir Francis Pemberton, Sir Cresswell Levinz, Mr. Pollexfen, Sir George Treby, and Mr. Somers.

When the bishops were before the Court, the writ and return were read, and after much discussion as to whether the warrant of committal was legal, and whether the defendants could be called on to plead, the proceedings of the day terminated by the bishops all pleading Not guilty, and entering into their own recognizances to appear for trial that day fortnight (June 29th).

On that day, as soon as the defendants had answered to their names, the clerk of the Court read the following information:—

Informa-
tion.

“Memorandum, That Sir Thos. Powis, knt., Attorney General of our lord the king, who for our said lord the king in this behalf prosecutes, came here in his own person into the court of our said lord the king, before the king himself at Westminster, on, &c.; and on the behalf of our said lord the king, giveth the court here to understand and be informed that our said lord the king, out of his signal clemency and gracious intention towards the subjects of his kingdom of England, by his royal prerogative, on the 4th day of April, in the 3rd year of the reign of our said lord the king, at Westminster in the county of Middlesex, did publish his royal Declaration,

(*t*) 7 Foss, Judges of England, 28.

(*u*) *Ib.*, 122.

(*v*) *Ib.*, 337.

(*w*) *Ib.*, 209. See 1 Gutch, *Col-
lectanea Curiosa*, 393.

intituled 'His Majesty's Gracious Declaration to all his loving Subjects for Liberty of Conscience,' sealed with the great seal of England, in which Declaration is contained, &c. (x).

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tion.

"And the said Attorney General further giveth the court here to understand and be informed, That afterwards, to wit, on the 27th day of April, in the 4th year of the reign of our said lord the king, at Westminster aforesaid, in the county of Middlesex aforesaid, our said lord the king, out of his like clemency and gracious intention towards his subjects of his kingdom of England, by his royal prerogative, did publish his other royal Declaration, intituled 'His Majesty's Gracious Declaration,' sealed with his great seal of England; in which Declaration is contained, &c. (y).

"Which said royal Declaration of our said lord the king last mentioned, our said lord the king afterwards, to wit, on the 30th day of April, at Westminster aforesaid, did cause to be printed and published throughout all England; and for the more solemn declaring, notification, and manifestation of his royal grace, favour, and bounty towards all his liege people, specified in the Declaration last mentioned, afterwards, our said lord the king in due manner did order, &c. (z).

"And further, the said Attorney General, &c., giveth the court here to understand and be informed, that after the making of the said order, to wit, on the 18th day of May, in the 4th year of the reign of our said lord the king, at Westminster aforesaid, in the county of Middlesex, aforesaid, [the defendants] did consult and conspire among themselves to diminish the regal authority, and royal prerogative, power and government of our said lord the king, in the premises, and to infringe and elude the said order; and in prosecution and execution of the con-

(x) *Ante*, p. 406.

(y) *Ante*, p. 410.

(z) *Ante*, p. 411.

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tion.

spiracy aforesaid, they the said [defendants] with force and arms, &c., at, &c., falsely, unlawfully, maliciously, seditiously, and scandalously did frame, compose, and write, and caused to be framed, composed and written, a certain false, feigned, malicious, pernicious, and seditious libel in writing, concerning our said lord the king, and his royal Declaration and order aforesaid, (under pretence of a petition,) and the same false, feigned, malicious, pernicious, and seditious libel by them the aforesaid [defendants], with their own hands respectively being subscribed, on the day and year, and in the place last mentioned, in the presence of our said lord the king, with force and arms, &c. did publish and cause to be published; in which said false, feigned, malicious, pernicious, and seditious libel is contained (a), 'The humble petition,' &c. [*prout* before in the petition, to these words 'reasonable construction'] (b) in manifest contempt of our said lord the king, and of the laws of this kingdom, to the evil example of all others in the like case offending, and against the peace of our said lord the king, his crown, and dignity, &c. Whereupon the said Attorney General of our said lord the king, on behalf of our said lord the king, prays the advice of the Court here in the premises, and due process of law to be made out against the aforesaid [defendants] in this behalf, to answer our said lord the king in and concerning the premises, &c."

Mr. Wright then opened the pleadings, and the Attorney-General spoke as follows:—

Opening of
the Attor-
ney-General.

May it please your lordship, and you gentlemen of the jury, you have heard this information read by the clerk, and it has been likewise opened to you at the bar; but before we go to our evidence, perhaps it may not be amiss for us, that are of counsel for the king, now in the

(a) It may be observed that the address to the king at the commencement, and the prayer at the end of

the petition, are here omitted.

(b) *Ante*, p. 412.

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beginning of this cause, to settle the question right before you, as well to tell you what my lords the bishops are not prosecuted for, as what they are. First, I am to tell you, and I believe you cannot yourselves but observe, that my lords are not prosecuted as bishops, nor much less are they prosecuted for any point or matter of religion, but they are prosecuted as subjects of this kingdom, and only for a temporal crime, as those that have injured and affronted the king to his very face; for it is said to be done in his own presence. In the next place, they are not prosecuted for any nonfeasance, or not doing or omitting to do anything, but as they are actors, for censuring of his Majesty and his government, and for giving their opinion in matters wholly relating to law and government: and I cannot omit here to take notice, that there is not any one thing that the law is more jealous of, or does more carefully provide for the prevention and punishment of, than all accusations and arraignments of the government. No man is allowed to accuse even the most inferior magistrate of any misbehaviour in his office, unless it be in a legal course, though the fact is true. No man may say of a justice of peace to his face, that he is unjust in his office (c). No man may tell a judge, either by word or petition, you have given an unjust, or an ill judgment, and I will not obey it; it is against the rules and law of the kingdom. No man may say of the great men of the nation, much less of the great officers of the kingdom, that they do act unreasonably or unjustly, or the like; least of all may any man say any such thing of the king; for these matters tend to possess the people, that the government is ill administered; and the consequence of that is, to set them upon desiring a reformation; and what that tends to, and will end in, we have all had a sad and too dear bought experience; the last age will abundantly satisfy us, whither such a thing does tend. Men are to

(c) See Serjt. Levinz's speech, *post*, p. 462.

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take their proper remedies for redress of any grievances they lie under, and the law has provided sufficiently for that. These things are so very well known to all men of the law, and indeed to all the people of England of any understanding, that I need not, nor will, stand any longer upon it, but come to the matter that is now before you, gentlemen, to be tried. The fact that we have laid we must prove, rather to keep the formality of a trial, than to pretend to inform you or tell you what you do not know: it is publicly notorious to the whole world; but because we must go on in the regular methods of law, we shall prove the facts in the order they are laid in the information. First, we take notice, that his Majesty, of his great clemency and goodness to his people, and out of his desire that all his subjects might live easily under him (of which I think never prince gave greater or more plain evidence of his intentions that way), on the 4th April, 1687, did issue forth his royal Declaration for liberty of conscience. This matter, without question, was welcome to all his people that stood in need of it; and those that did not could not but say, the thing in the nature of it was very just and gracious; but presently it must be surmised, that the king was not in earnest, and would not, nor could, make good his promise: but to take away all surmises, his Majesty was pleased by his Declaration of the 27th of April last, not only to repeat his former declaration, but likewise to renew his former promises to his people, and to assure them that he still was, and yet is, of the same opinion that he had at first declared himself to be of; nay, we further show you, that to the end that this thing might be known to all his people, even to the meanest men, who, it may be, were not willing or able to buy the Declaration, and that the king himself might be under higher obligations, if it were possible, than his own word, he was desirous it should be repeated in the churches, and read in that sacred place, that all his people might hear what he had promised, and

given his own sacred word for ; and he himself might be under the solemn tie and obligation to keep his word, by remembering that his promises had, by his own command, been published in the time of divine service, in the house of God ; and thereupon was the Order of Council made, that has been likewise read to you, which does direct, that it should be read in all the churches and chapels in the kingdom ; and you have heard, and we shall prove what a return his Majesty has had for this grace and kindness of his : you'll find, when they come to read that which they call a petition, all their thanks his Majesty had for his favour and goodness to his people, 'tis only hard words, and heavy accusation, such as a private person would be little able to bear. I will not aggravate the matter, but only say thus much, that his Majesty, who was always a prince of as great clemency as ever this kingdom had, and who was represented for all that as a prince of the greatest cruelty, before his accession to the crown, by his enemies, is now accused by his friends for this effect of his mercy. My lord, and gentlemen of the jury, his Majesty resented this ill usage so far, that he has ordered, and thought fit to have a public vindication of his honour in this matter, by this trial ; and we shall go on to our proofs, and we do not doubt but you will do his Majesty (as you do all other persons) right.

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The declarations of indulgence were then read and proved, also the warrant for their being read in the churches.

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tion.

The original petition was put in, and much time spent in endeavouring to prove the handwriting of the bishops, which was at last done by calling Mr. Blathwayt, a clerk of the privy council, who had been present when the defendants were questioned by the king, and he swore that each of them had owned his signature (*d*).

(*d*) As to the mode of proving a person's handwriting, see Taylor on

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The petition was then read, and this being done, there was no proof forthcoming that it had been written in Middlesex, the fact indeed was that it had been written in Surrey.

The next thing accordingly was to prove a publication in Middlesex. The Court agreed that the presentation to the king was a publication in law (*e*), but there was no

Evidence, 8th ed., 1545. The Common Law Procedure Act, 1854, s. 27, enacts that "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such writing and the evidence of witnesses respecting the same may be submitted to the Court, and given as evidence of the genuineness or otherwise of the writing in dispute."

This provision, which only applied to Civil Courts, has been extended to Criminal cases by 28 Vict. c. 18, s. 8.

(*e*) In *Lamb's Case*, 9 Rep. 59 b, it was resolved that "every one who shall be convicted, either ought to be a contriver of a libel, or a procurer of the contriving of it, or a malicious publisher of it, knowing it to be a libel; for if one reads a libel, that is no publication of it, or if he hears it read, it is no publication of it, for before he reads or hears it, he cannot know it to be a libel; or if he hears or reads it, and laughs at it, it is no publication of it; but if after he has read or heard it, he repeats it, or any part of it, in the hearing of others, or after that he knows it to be a libel, he reads it to others, that is an unlawful publication of it; or if he writes a copy of it, and does not publish it to others, it is no publication of the libel;

for every one who shall be convicted ought to be a contriver, procurer, or publisher of it, knowing it to be a libel. But it is great evidence that he published it, when he, knowing it to be a libel, writes a copy of it, unless afterwards he can prove that he delivered it to a magistrate to examine it; for then the act subsequent explains his intention precedent."

This seems far more reasonable than the opinion of the judges in *R. v. Paine*, 5 Mod. 163, where it was laid down that "if one repeat and another write a libel, and a third approve what is wrote, they are all makers of it." Although in this last case the Court were of opinion that the making a libel is an offence, though never published, it is now well established that merely writing a libel is no offence unless it be published, *i.e.*, communicated to the public or some person. The law on this point will be found laid down in *Wenman v. Ash*, 13 C. B. 836; 22 L. J. C. P. 190, where it was held a publication to send a libel in a letter to the plaintiff's wife, (although husband and wife are generally considered as one in actions of tort as well as of contract, see *Phillips v. Barnet*, 1 Q. B. D. 436; 45 L. J. Q. B. 277). When a libel has once been written or printed, any mode of exhibiting it o

evidence of that publication. Various witnesses were called to prove it, but without success; and the Chief Justice had actually begun to sum up, when he was interrupted by one of the counsel for the defendants, and during the discussion which took place it was announced that the Earl of Sunderland could prove the presentation to the king.

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The Court having adjourned till the earl appeared, he was sworn, and the trial proceeded in the following manner:—

Att.-Gen. We have brought the case to this point, that this petition came to the king's hands: that it is a petition written by my lord archbishop and subscribed by the rest of my lords the bishops; but there is a difficulty made, whether this petition thus prepared and written was by them delivered to the king, and whether my lords the bishops were concerned in the doing of it, and were privy, or parties to the delivery? Now that which I would ask your lordship, my lord president, is, whether they did make their application to your lordship to speak to the king?

Sol.-Gen. Did they make their application to your lordship upon any account whatsoever?

Lord President. My Lord, my lord bishop of St. Asaph, and my lord bishop of Chichester came to my office, and told me they came in the names of my lord archbishop of Canterbury, and the bishops of Ely, Bath and Wells, Bristol, and Peterborough, and themselves, with a petition, which they desired to deliver to his Majesty, and they did come to me to know which was the best way of

making it public will be considered a publication in law, and it would seem that the fact of causing a libel to be printed (if the author did not print it with his own hands), would be a publication. *Burdett v. Abbott*, 14 East, 1, 153. In *R. v. Burdett*, 4 B.

& A. 95, it was held by three judges out of four, that a delivery at the post-office of a sealed letter containing a libel is a publication in the county where the post-office is situate. And see generally as to publication, Odgers on Libel and Slander, p. 150, *et seq.*

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tion.

doing it, and whether the king would give them leave to do it or not? They would have had me read their petition, but I refused it, and said, I thought it did not at all belong to me, but I would let the king know their desire, and bring them an answer immediately, what his pleasure was in it; which I did. I acquainted the king, and he commanded me to let my lords the bishops know, they might come when they pleased, and I went back and told them so; upon which they went and fetched the rest of the bishops, and, when they came, immediately they went into the bed-chamber, and into another room, where the king was. This is all that I know of the matter.

Sol.-Gen. About what time was this, pray, my lord?

Lord President. I believe there could not be much time between my coming from the king, and their fetching their brethren, and going in to the king.

Sol.-Gen. They were with the king that day?

Lord President. Yes, they were.

Sol.-Gen. Was this before they appeared in council?

Lord President. Yes, it was several days before.

Just. Allibone. Did they acquaint your lordship that their business was to deliver a petition to the king?

Lord President. Yes, they did.

Sol.-Gen. And they would have had my lord read it, he says.

Att.-Gen. And this was the same day that they did go in to the king?"

Lord President. The very same day, and I think the same hour; for it could not be much longer.

L. C. J. Will you ask my lord president any question, you that are for the defendants?

Sir R. Sawyer. No, my lord.

L. C. J. Truly, I must needs tell you, there was a great presumption before, but there is a greater now, and I think I shall leave it with some effect to the jury. I cannot see but here is enough to put the proof upon you.

They came to the lord president, and asked him how they might deliver a petition to the king; he told them he would go and see what the king said to it. They would have had him read their petition, but he refused it: he comes and tells them the king said they might come when they would: then those two that came to my lord president went and gathered up the other four (the archbishop indeed was not there), but they six came, and my lord president gave directions they should be let in, and they did go into the room where the king was. Now this, with the king's producing the paper, and their owning it at the council, is such a proof to me, as I think will be evidence to the jury of the publication.

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Sir R. Sawyer. May it please your lordship, and you gentlemen of the jury, you have heard this charge which Mr. Attorney has been pleased to make against my lords the bishops, that they did conspire to diminish the royal authority, and regal prerogative, power, and government of the king, and to avoid the order of council; and in prosecution of this, did falsely, maliciously and seditiously make a libel against the king, under pretence of a petition, and did publish the same in the king's presence.

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fendants.

This, gentlemen, is a very heinous and heavy charge; but you see how short their evidence is: the evidence they bring forth is only, that my lords the bishops presented the paper to the king in the most private and humble manner they could: that which they have been so many hours a proving, and which they cry up to be as strong an evidence as ever was given, proves it to be the farthest from sedition in the doing of it that can be: and you see what it is, it was a petition to be relieved against an order of council, which they conceive they were aggrieved by.

This petition is set forth to be a scandalous matter, but it only contains their reasons, whereby they would satisfy his Majesty why they cannot comply in a concurrence

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with his Majesty's pleasure; and therefore they humbly beseech the king, and beg and request him (as the words of it are) that his Majesty would be pleased not to insist upon their distributing and reading of this declaration: so the petitioners, on behalf of themselves and the whole clergy of England, beg of the king that he would please not to insist upon it.

Gentlemen, you may observe it, that there is nothing in this petition that contains anything of sedition in it; and it would be strange this petition should be *felo de se* and by one part of it destroy the other. It is laid indeed in the information, that it was with intent and purpose to diminish the king's royal authority; but I appeal to your lordship, the court, and the jury, whether there be any one word in it, that any way touches the king's prerogative, or any tittle of evidence that has been given to make good the charge. It is an excuse barely for their non-compliance with the king's order, and a begging of the king with all humility and submission, that he would be pleased not to insist upon the reading of his Majesty's declaration upon these grounds, because the dispensing power upon which it was founded had been several times in parliament declared to be against law, and because it was a case of that consequence that they could not in prudence, honour, or conscience concur in it.

My lord, Mr. Attorney has been pleased to charge in this information, that this is a false, malicious, and seditious libel: both the falsity of it, and that it was malicious and seditious, are all matters of fact, which, with submission, they have offered to the jury no proof of, and I make no question but easily to demonstrate the contrary.

For I think it can be no question but that where any subject is commanded by the king to do a thing which he conceives to be against law, and against his conscience, he may humbly apply himself to the king, and tell him the reason why he does not that thing he is commanded to

do, why he cannot concur with his Majesty in such a command.

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That which Mr. Attorney did insist upon in the beginning of this day was, that, in this case, my lords the bishops were not sued as bishops, nor prosecuted for their religion. Truly I do not know what they are sued for else : the information is against them as bishops, it is for an act they did as bishops, and no otherwise ; and for an act they did, and do conceive they lawfully might do with relation to their ecclesiastical polity, and the government of their people as bishops.

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fendants.

The next thing that Mr. Attorney offered was, that it was not for a non-feasance, but for a feasance. It is true it is for a feasance in making of the petition, but it was to excuse a non-feasance, the not reading according to the order ; and this sure was lawful for all the bishops as subjects to do ; and I shall show it was certainly the duty of my lords the bishops, or any peer of this realm, to do the same in a like case. It was likewise said, they were prosecuted here for affronting the government, and intermeddling with matters of state ; but I beg your lordship and the jury to consider, whether there is one tittle of this mentioned in the petition, or any evidence given of it. The petition does not meddle with any matter of state, but refers to an ecclesiastical matter, to be executed by the clergy, and to a matter that has relation to ecclesiastical causes ; so that they were not busybodies, or such as meddled in matters that did not relate to them, but in that which was properly within their sphere and jurisdiction.

But after all, there is no evidence, nor any sort of evidence that is given by Mr. Attorney, that will maintain the least tittle of this charge ; and how he comes to leave it upon this sort of evidence I cannot tell ; all that it amounts to is this, that my lords the bishops, being grieved in this manner, made this petition to the king in the most private and respectful manner ; and for him

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to load it with such horrid black epithets, that it was done libellously, maliciously, and scandalously, and to oppose the king and government, 'tis very hard; 'tis a case of a very extraordinary nature, and I believe my lords the bishops cannot but conceive a great deal of trouble, that they should lie under so heavy a charge, and that Mr. Attorney should draw so severe an information against them, when he has so little proof to make it out.

We say, in short, that this petition is no more than what any man, if he be commanded to do anything, might humbly do, and not be guilty of any crime: and, as to the matter of our defence, it will consist of these heads: We shall consider—

I. The matter of this petition.

II. The manner of delivering it, according as they have given evidence here.

III. The persons that have delivered this petition.

And we hope to make it appear, beyond all question, that the matter contained in this petition, is neither false nor contrary to law, but agreeable to all the laws of the land in all times. We shall likewise show (though that appears sufficiently already) that the manner of delivering it was so far from being seditious, that it was in the most secret and private manner, and with the greatest humility and duty imaginable. And then as to the persons, we will show that they are not such, as Mr. Attorney says, who meddle with matters of state, that are out of their sphere; but they are persons concerned, and concerned in interest in the case, to make this humble application to the king.

The matter
of the peti-
tion.

I. For the matter of the petition, we shall consider two things.

1. The prayer, which is this; They humbly beg and desire of the king, on behalf of themselves and the rest of the clergy, that he would not insist upon the reading and publishing of this declaration.

Surely there is nothing of falsity in this, nor anything that is contrary to law, or unlawful for any man that is pressed to anything, especially by an order of council; and this is nothing but a petition against an order of council; and if there be an order that commands my lords the bishops to do a thing that seems grievous to them, surely they may beg of the king that he would not insist upon it. As for this matter, they were so well satisfied about it, and so far from thinking that it was any part of a libel, that they left it out of the information, and so have made a deformed and absurd story of it, without head or tail, a petition directed to nobody, and for nothing, it being without both title and prayer; so that this is plain, it was lawful to petition.

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fendants.

2. The next thing is, the reasons which my lords the bishops came to acquaint the king with, why in honour and conscience they cannot comply with, and give obedience to this order; and the reasons are two.

The first reason assigned, is, the several declarations that have been in parliament (several of which are mentioned) that such a power to dispense with the law, is against law, and that it could not be done but by an Act of Parliament: for that is the meaning of the word *illegal*, that has no other signification but unlawful: the same word in point of signification with the word *illicite*, which they have used in their information, a thing that cannot be done by law; and this they are pleased to tell the king, not as declaring their own judgments, but what has been declared in Parliament; though if they have done the former, they being peers of the realm, and bishops of the church, are bound to understand the laws, especially when (as I shall come to show you) they are made guardians of these laws; and if anything go amiss, and contrary to these laws, they ought to inform the king of it.

Certainly this was a case of the greatest consequence to the whole nation that ever was, therefore it could not be false or libellous to say so.

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My lord, I would not mention this, for I am loth to touch upon things of this nature, had not the information itself made it the very gist of the charge; for the information (if there be anything in it) says, that it was to diminish the king's prerogative and regal power in publishing that declaration. Now what the consequence of this would be, and what my lords the bishops meant, by saying it was a cause of great moment, will appear, by considering that which is the main clause in the declaration, at which my lords the bishops scrupled, which is the main stumbling-block to my lords, and has been to many honest men besides, and that is this:—

“We do likewise declare, it is our royal will and pleasure, that from henceforth the execution of all and all manner of penal laws, in matters ecclesiastical, for not coming to church, or not receiving the sacrament or for any other non-conformity to the religion established, or for or by reason of the exercise of religion in any manner whatsoever, be immediately suspended; and the further execution of the said penal laws, and every of them, is hereby suspended.” (f)

Now this clause either is of some legal effect and signification, or it is not. If Mr. Attorney do say it is of no effect in law, then there is no harm done; then this peti-

(f) Here the Lord Chief Justice, speaking aside, said,

L. C. J. I must not suffer this; they intend to dispute the king's power of suspending laws.

Justice Powell. My lord, they must necessarily fall upon the point; for if the king hath no such power (as clearly he hath not in my judgment), the natural consequence will be, that this petition is no diminution of the king's regal power, and so not seditious or libellous.

L. C. J. Brother, I know you are

full of that doctrine; but, however, my lords the bishops shall have no occasion to say, that I deny to hear their counsel. Brother, you shall have your will for once, I will hear them, let them talk till they are weary.

Justice Powell. I desire no greater liberty to be granted them, than what in justice the court ought to grant, that is, to hear them in defence of their clients. 1 Ralph, Hist. Eng. 992.

tion does no ways impeach the king's prerogative, in saying it has been declared in parliament, according as the king's counsel do agree the law to be.

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But if it have any effect in law, and these laws are suspended by virtue of this clause in the declaration; then certainly it is of the most dismal consequence that can be thought of, and it behoved my lords, who are the fathers of the church, humbly to represent it to the king.

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fendants.

For by this declaration, and particularly by that clause in it, not only the laws of our Reformation, but all the laws for the preservation of the Christian religion in general are suspended, and become of no force; if there be such an effect in law wrought by this declaration as is pretended; that is, that the obligation of obedience to them ceaseth; the reason of it is plain, the words cannot admit of such a quibble as to pretend, that the suspending the execution of the law, is not a suspending of the law; for we all know the end of every law, in its primary intent, is obedience to it; that of the penalty comes in by the way of punishment and recompense for their disobedience.

Now if this declaration does discharge the king's subjects from their obedience to, and the obligation from those laws; then pray, my lord, where are we? Then all the laws of the Reformation are suspended, and the laws of Christianity itself, by those latter words, "or for or by reason of religion in any manner whatsoever," so that it is not confined to the Christian religion, but all other religions are permitted under this clause; and thus all our laws for keeping the Sabbath, and which distinguish us from heathens, will be suspended too. This is such an inconvenience as, I think, I need name no more; and it is a very natural consequence from that clause of the declaration; it discharges at once all ministers and clergymen from performing their duty in reading the service of the church; it discharges their hearers from attending

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upon that service. When a law is suspended, the obligation thereof is taken away; and those that before thought themselves bound to obey, now conclude they are not so obliged; and what a mischief that will be to the church, which is under the care of my lords the bishops, your lordships will easily apprehend.

These things I only mention to show the great and evil consequences that apparently follow upon such a declaration, which made my lords the bishops decline obeying the order, and put them under the necessity of applying thus to the king, to acquaint him with the reasons why they could not comply with his commands to read this declaration to the people, because the consequences thereof were so great, it tending naturally to lead the people into so great an error, as to believe those laws were not in force, when in truth and reality they are still in force, and continue to oblige them.

And that being the second reason in this petition, I come next to consider it, to wit, that the parliament had often declared this pretended power to be illegal; and for that we shall read the several records in parliament mentioned in their petition, and produce several ancient records of former parliaments that prove this point; and particularly in the time of Richard II., concerning the statute of provisors (*g*); where there were particular dispensations for that statute, the king was enabled to do it by Act of Parliament, and could not do it without. I do but shortly mention these things; so that as to the matter of this petition, we shall show that it is true and agreeable to the laws of the land.

The manner
of deliver-
ing the
petition.

II. Then as to the manner of delivering it, I need say no more, but that it is plain from their evidence, that it was in the most private and humble manner. And, as the lord president said, leave was asked of the king for

them to be admitted to present it: leave was given, and accordingly they did it.

III. We come then to the third thing, the persons, these noble lords; and we shall show they are not busybodies, but in this matter have done their duty, and meddled with their own affairs. That will appear;

First, by the general care that is reposed in them by the law of the land: they are frequently in our books called the king's spiritual judges; they are entrusted with the care of souls, and the superintendency over all the clergy is their principal care. But, besides this, there is another special care put upon them by the express words of an Act of Parliament; for over and above the general care of the church, by virtue of their offices as bishops, the stat. 1 Eliz. c. 2, makes them special guardians of the law of uniformity, and of that other law in his late Majesty's reign (*h*), where all the clauses of that statute of 1 Eliz. are revived and made applicable to the present state of the Church of England. Now in that statute of 1 Eliz. there is this clause: (*i*)

“And for the due execution hereof, the queen's most excellent Majesty, the lords spiritual and temporal, and all the commons in this present parliament assembled, do, in God's name, earnestly require all the archbishops, and bishops, and other ordinaries, that they do endeavour themselves, to the utmost of their knowledges, that the due and true execution hereof may be had throughout their dioceses and charges, as they will answer before God, for such evils and plagues wherewith Almighty God may justly punish his people, for neglecting this good and wholesome law.”

This is the charge that lies upon the bishops, to take care of the execution of that law; and I shall pray by-and-by, that it may be read to the jury.

So that by this law the bishops, upon pain of bringing

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(*h*) 13 & 14 Car. 2, c. 4.

(*i*) S. 15.

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upon themselves the imprecation of this Act of Parliament, are obliged to see it executed; and then, my lord, when anything comes under their knowledge (especially if they are to be actors in it), that hath such a tendency to destroy the very foundation of the church, as the suspension of all the laws that related to the church must do, it concerns them that have no other remedy, to address the king, by petition, about it. For Mr. Attorney has agreed that if a proper remedy be pursued in a proper court, for a grievance complained of, though there may be many hard words that else would be scandalous, yet being in a regular course, they are no scandal: and so it is said in *Lake's case* (k).

My lord, we must appeal to the king, or we can appeal to nobody, to be relieved against an order of council with which we are aggrieved; and it is our duty so to do, according to the care that the law hath placed in us. Besides, the bishops were commanded by this order to do an act relating to their ecclesiastical function, to distribute it to be read by their clergy: and how could they in conscience do it, when they thought part of the declaration was not according to law?

Pray what has been the reason of his Majesty consulting his judges? And if his Majesty, or any of the great officers, by his command, are about to do anything that is contrary to law, was it ever yet an offence to tell the king so? I always looked upon it as the duty of an officer or magistrate to tell the king what is law, and what is not law.

In *Cavendish's case* (l), there was an office granted of the return of the writs of supersedeas in the Court of Common Pleas; and he comes to the court, and desires to be put into the possession of the office: the court told him, they could do nothing in it, but he must bring his assize. He applies to the queen, and she sends under

(k) Hobart, 252.

(l) Anderson, 152.

the privy seal, a command to sequester the profits, and to take security to answer the profits, as the judgment of the law should go : but the judges there return an answer, that it was against law (*m*), and they could not do it. Then there comes a second letter, reciting the former, and commanding their obedience : the judges returned for answer, they were upon their oaths, and were sworn to keep the laws, and would not do it.

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Now here is a case full as strong : my lords the bishops were commanded to do an act, which they conceived to be against law, and they declined it, and tell the king the reason ; and they have done it in the most humble manner that could be, by way of petition. If they had done (as the civil law terms it) *rescribere* generally, that had been lawful ; but here they have done it in a more respectful manner by an humble petition. If they had said the law was otherwise, that sure had been no fault ; but they do not so much as that, but they only say, it was so declared in parliament : and they declare it with all humility and dutifulness. So that if we consider the persons of the defendants, they have not acted as busybodies ; and therefore, as this case is, when we have given our evidence, here will be an answer to all the implications of law that are contained in this information ; for they would have this petition work by implication of law, to make a libel of it ; but by what I have said, it will appear, there was nothing of sedition, nothing of malice, nothing of scandal in it, nothing of the salt, and vinegar, and pepper that they have put into the case. We shall prove the matters that I have opened for our defence, and then, I dare say your lordship and the jury will be of opinion, we have done nothing but our duty.

Mr. Finch. Supposing now, my lord, that they have delivered this petition, let us consider what the question is between the king and my lords the bishops : the

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question is, whether they are guilty of contriving to diminish the king's regal authority and royal prerogative, in his power and government, in setting forth this declaration? Whether they are guilty of the making and presenting a malicious, seditious, and scandalous libel; and whether they have published it, as it is said in the information; in the king's presence?

The question is not now, whether this paper was delivered to the king by my lords the bishops; but whether they have made a malicious and scandalous libel, with an intent to diminish the king's royal prerogative, and kingly authority? So, if you, gentlemen, should think that there is evidence given sufficient to prove that my lords the bishops have delivered to the king that paper which is set forth in the information; yet unless they have delivered a false, malicious, seditious, and scandalous libel; unless they have published it, to stir up sedition in the kingdom; and unless they have contrived this by conspiracy to diminish the king's royal prerogative and authority, and that power that is said to be in the king, my lords the bishops are not guilty of this accusation.

The petition does humbly set forth to his Majesty that there having been such a declaration, and such an order of council; they did humbly represent to his Majesty, that they were not averse to anything commanded them in that order, in respect to the just and due obedience that they owed to the king, nor in respect of their want of a due tenderness to those persons to whom the king had been pleased to show his tenderness; but the declaration being founded upon a power of dispensing, which had been declared illegal in parliament several times, and particularly in the years 1662, 1672, and 1685, they did humbly beseech his Majesty (they not being able to comply with his command in that matter) that he would not insist upon it.

Now, my lord, where is the contrivance to diminish the

king's regal authority and royal prerogative? This is a declaration founded upon a power of dispensing, which undertakes to suspend all laws ecclesiastical whatsoever; for not coming to church, or not receiving the sacrament, or any other non-conformity to the religion established, or for or by reason of the exercise of religion in any manner whatsoever; ordering that the execution of all those laws be immediately suspended, and they are thereby declared to be suspended; as if the king had a power to suspend all the laws relating to his established religion, and all the laws that were made for the security of our Reformation. These are all suspended by his Majesty's declaration (as it is said in the information), by virtue of his royal prerogative, and power so to do.

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Now I have always taken it that a power to abrogate laws, is as much a part of the legislature, as a power to make laws: a power to lay laws asleep, and to suspend laws, is equal to a power of abrogating them; for they are no longer in being, as laws, while they are so laid asleep, or suspended: and to abrogate all at once, or to do it time after time, is the same thing; and both are equally parts of the legislature.

My lord, in all the education that I have had, in all the small knowledge of the laws that I could attain to, I could never yet hear of, or learn, that the constitution of the government in England was otherwise than thus, that the whole legislative power is in the king, lords, and commons; the king and his two houses of parliament. But then, if this declaration be founded upon a part of the legislature, which must be by all men acknowledged not to reside in the king alone, but in the king, lords, and commons, it cannot be a legal and true power, or prerogative.

This has only been attempted in the last king's time; it never was pretended till then; and in that first attempt, it was so far from being acknowledged, that it was taken

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notice of in parliament, and declared against : so it was in the years 1662, 1672.

In the year 1662 (*n*), where there was but the least umbrage of such a dispensing power ; although the king had declared, in his speech to the parliament, that he wished he had such a power, which his declaration before seemed to assume ; the parliament was so jealous of this, that they immediately made their application to his Majesty, by an address against the declaration ; and they give reasons against it, in their address : one in particular was, " That the king could not dispense with those laws without an Act of Parliament."

There was another attempt in 1672 (*o*), and then, after his Majesty had, in his speech, mentioned his declaration to them, the parliament there again, particularly the House of Commons, did humbly address his Majesty ; setting forth, that this could not be done by law without an Act of Parliament : and your lordship, by-and-by, upon reading the record, will be satisfied what was the event of all this. His Majesty himself was so far pleased to concur with them in that opinion, that he cancelled his declaration, tore off the seal, and caused it to be made known to the House of Lords by the lord chancellor, who by his Majesty's command, satisfied the house of it, that his Majesty had broken the seal, and cancelled the declaration ; with this further declaration, which is entered in the records of the House, " That it should never be drawn into example, or consequence " (*p*).

My lord, the matter standing thus, in respect to the king's prerogative, and the declarations that had been made in parliament ; consider next, I beseech you, how far the bishops were concerned in this question, humbly to make their application to the king. My lords the bishops lying under a command to publish this declaration, it was

(*n*) *Post*, pp. 447 *et seq.*

(*o*) *Post*, pp. 452 *et seq.*

(*p*) *Post*, p. 457.

their duty, as peers of the realm and bishops of the Church of England, humbly to apply themselves to his Majesty, to make known their reason why they could not obey that command; and they do it with all submission, and all humility, representing to his Majesty what had been declared in parliament; and, it having been so declared, they could not comply with this order, as apprehending that this declaration was founded upon that which the parliament declared to be illegal; and so his Majesty's command to publish this declaration would not warrant them so to do. This they did as peers; and this they had a right to do as bishops, humbly to advise the king.

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For, suppose (which is not to be supposed in every case, nor do I suppose it in this), that there might be a king of England that should be misled. I do not suppose that to be the case now (but I know it hath been the case formerly), that the king should be environed with counsellors that had given him evil advice; it hath been objected as a crime against such evil counsellors that they would not permit and suffer the great men of the kingdom to offer the king their advice. How often do we say in Westminster-hall, that the king is deceived in his grant: there is scarce a day in the term, but it is said in one court or other; but it was never yet thought an offence to say so: and what more is there in this case? If the king was misinformed, or under a misapprehension of the law, my lords, as they are peers, and as they are bishops, are concerned in it; and if they humbly apply themselves to the king, and offer him their advice, where is the crime? My lord, the defendants had more than an ordinary call to this; for besides the duty of their office and the care of the church, that was incumbent on them as bishops, they were here to become actors; for they were, by that order of council, commanded themselves to publish it, and to distribute it to the several ministers in their several dioceses, with their commands

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to read it : therefore they had more than ordinary reason to concern themselves in the matter.

My lord, I hope nothing of this can be thought an offence : if the jury should think that there has been evidence sufficient given to prove that my lords the bishops did deliver this paper to the king ; yet that is not enough to make them guilty of this information, unless this paper be likewise found to be in diminution of the king's royal prerogative and regal authority in dispensing with, and suspending of, all laws without Act of Parliament : unless it be found to be a libel, against the king to tell him, that in parliament it was so and so declared. And unless the presenting this by way of petition (which is the right of all people that apprehend themselves aggrieved,—to approach his Majesty by petition) be a libelling of the king ; and unless this humble petition, in this manner presented to the king in private, may be said to be a malicious and seditious libel, with an intent to stir up the people to sedition ; unless all this can be found, there is no man living that can ever find my lords the bishops guilty upon this information.

Mr. Pollex-
fen's speech.

Mr. Pollexfen. Pray, my lord, spare me a word on the same side. For the first point, it is a point of law whether the matter contained in this petition be a libel. The king's counsel pretend it is so, because it says the declaration is founded upon a power the parliament has declared to be illegal. But we say, that whatsoever the king is pleased to say in any declaration of his, it is not the king's saying of it that makes it to be law. Now, we say, this declaration under the great seal is not agreeable to the laws of the land ; and for this reason, because it does, at one blow, set aside all the law we have in England. The cases that we have had of dispensations, are all so many strong authorities against a general or particular abrogation. If they say, that the penal laws in matters ecclesiastical can be abrogated or nulled, or made void *pro tempore*, or for life, without the meeting of the

king and people in parliament, I must confess, they say a great thing, as it is a point of great concern; but I think that will not be said: and all that has been ever said in any case, touching dispensations, proves quite the contrary and asserts what I affirm. For why should any man go about to argue, that the king may dispense with this or that particular law, if at once he can dispense with all law, by an undoubted prerogative? This is a point which we insist upon, and are ready to argue with them; but we will go on with the rest of those things that we have offered: and first, we will read that clause of the Act of Uniformity, made 1 Eliz., where they are so strictly charged to see the execution of that law (q).

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This Act, my lord, by the Act of Uniformity, made in the beginning of the late king's reign, is revived, with all the clauses in it relating to this matter. If, then, this be a duty incumbent upon the defendants, and their oaths require it of them; and if they find that the pleasure of the king, in his declaration, is that which is not consonant to this law, what can they do?

Can anything be more humble, or done with a more Christian mind, than, by way of petition, to inform the king in the matter? For I never thought it, nor hath it ever, sure, been thought by anybody else, to be a crime to petition the king. When this is done, to make it a libel, by putting in the words "malicious, seditious, scandalous, and with an intent to raise sedition," would be pretty hard.

Serj. Pemberton. My lords, the bishops are here accused of a crime of a very heinous nature; they are branded and stigmatized by this information, as if they were seditious libellers; when it will in truth fall out that they have done no more than their duty; their duty to God, their duty to the king, and their duty to the church. For in this case, that which we humbly offer to your

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lordship is : That the kings of England have no power to suspend or dispense with the laws and statutes of the kingdom, that establish religion. And we say, that such a dispensing power is a thing that strikes at the very foundation of all the rights, liberties, and properties of the king's subjects whatsoever. If the king may suspend the laws of the land which concern our religion, I am sure there is no other law but he may suspend ; and if the king may suspend all the laws of the kingdom, what a condition are all the subjects in, for their lives, liberties, and properties ? All at mercy.

The king's legal prerogatives are as much for the advantage of his subjects as himself ; and no man goes about to speak against them : but, under pretence of legal prerogatives, to extend the power of the king to support a prerogative, that tends to the destruction of all his subjects, their religion and liberties ; in that, I think, they do the king no service, who go about to do it.

Such a power to dispense with or suspend the laws of a nation, cannot with any shadow of reason be. It is not long since that such a power was ever pretended to by any, but such as have the legislative too ; for it is plain, that such a power must at least be equal to the power that made the laws. To dispense with a law must argue a power greater than, or at least as great as, that which made the law.

It has been often said in our books, that where the king's subjects are concerned in interest, the king cannot suspend or dispense with a particular law (*s*). But how can the king's subjects be more concerned in interest, than when their religion lies at stake ? It has been resolved, upon the statute of Simony (*t*), that where the statute has disabled the party to take, there the king could not enable him against that Act of Parliament : and shall it be said, that by his dispensation he shall

(*s*) *Post*.

(*t*) *Post*.

enable one to hold an office who is disabled by the Test Act?

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My lord, we say, the course of our law allows no such dispensation as the declaration pretends to : and he that is but meanly read in our law, must needs understand this, That the kings of England cannot suspend our laws ; for that would be to set aside the law of the kingdom ; and then we might be clearly without any laws, if the king should please to suspend them.

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[A true copy of the Record in English, out of the Rolls of Parliament, in the 15th year of King Richard II., No. 1, was here put in.

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This record, after mentioning two occasions why a particular parliament was called, went on to say :—“ And the third occasion was, touching the statutes of Provisors (*u*), to ordain and see how our holy father might have that which to him belongs, and the king that which belongs to him, and his crown ; according unto that, ‘ Render unto Cæsar the things that are Cæsar’s, and unto God the things which are God’s.’ ”

Then the other Record of Richard II. was read as follows, out of the Rolls of Parliament, the 15th year of King Richard II., No. 8.

“ Be it remembered, touching the statute of Provisors, that the Commons, for the great confidence which they have in the person of our lord the king, and in his most excellent knowledge, and in the great tenderness which he hath for his crown, and the rights thereof ; and also, in the noble and high discretions of the lords, have assented, in full parliament, that our said lord the king, by advice and assent of the said lords, may make such sufferance, touching the said statute, as shall seem to him reasonable and profitable, until the next parliament, so as the said statute be not repealed in no article thereof ; and that all those who have any benefices by force of the said statute,

(*u*) 25 Edw. 3, stat. 6 ; 3 Rich. 2, c. 3 ; 7 Rich. 2, c. 12.

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before this present parliament: and also, that all those to whom any aid, tranquillity, or advantage is accrued, by virtue of the said statute, of the benefices of holy church (of which they were heretofore in possession) as well by presentation, or collation of our lord the king, as of the ordinaries, or religious persons whatsoever, or by any other manner or way whatsoever, may freely have and enjoy them, and peaceably continue their possession thereof, without being ousted thereof, or any ways challenged, hindered, molested, disquieted, or grieved hereafter, by any provisors or others against the form and effect of the statute aforesaid, by reason of the said sufferance in any time to come. And moreover, that the said Commons may disagree at the next parliament to this sufferance, and fully resort to the said statute, if it shall seem good to them to do it: with protestation, that this assent, which is a novelty, and has not been done before this time, be not drawn into example or consequence for time to come. And they prayed our lord the king, that the protestation might be entered of record in the Roll of the Parliament; and the king granted, and commanded to do it.”]

Serj. Levinz. This was in Richard II.’s time: and a power is given by the Commons to the king, with the assent of the Lords, to dispense, but only to the next parliament, with a power reserved to the Commons; and to disagree to it, and retract that consent of theirs the next parliament.

Sir George Treby. The statute of provisors was and is a penal law, and concerning ecclesiastical matters too; viz., The collating and presenting to archbishopricks, bishopricks, benefices, and dignities of the church: and, in this record now read, the parliament give the king a limited power, and for a short time, to dispense with that statute. But, to obviate all pretence of such a power being inherent in the Crown, as a prerogative, they declare, (1) That it was a novelty; that is as much as to

say, that the king had no such power before. (2) That it should not be drawn into example; that is to say, that he should have no such power for the future (v).

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Serj. Levinz. Now we will go on to the records mentioned in the petition: those in the last king's time in 1662, and 1672; and that in this king's time, in 1685.—Where is the Journal of the House of Lords?

[The Journal of the House of Lords for Feb. 18, 1662, was here produced (x), and the king's speech read, which contained the following passage:—

“To cure the distempers, and compose the different minds that are yet amongst us, I set forth my declaration, of the 26th of December (y). In which you may see I am willing to set bounds to the hopes of some, and to the fears of others: of which, when you shall have examined

(v) 2 Millar, Hist. Eng. Gov. 407.

(x) 11 Lords' Journ. 478.

(y) On December 26, 1662, the king issued a declaration, in which he complained that various scandals were current respecting his conduct, and among others that he had not adhered to his declaration from Breda (*post*, p. 451 (d), in reference to which he said, “Concerning the non-performance of our promises, we remember well the very words of those from Breda, viz., *We declare a liberty to tender consciences*, &c. We remember well the confirmations we have made of them since upon several occasions in parliament, and as all these things are still fresh in our memory, so are we still firm in the resolution of performing them to the full. But it must not be wondered at (since that parliament, to which those promises were made, in relation to our act, never thought fit to offer us any for that purpose), that being so zealous as we are (and by the grace of God

shall ever be) for the maintenance of the true Protestant religion, finding it so shaken (not to say overthrown) as we did, should give its establishment the precedency before matters of indulgence to dissenters from it. But that once done (as we hope it is sufficiently by the bill of uniformity), we are glad to lay hold on this occasion to renew, unto all our subjects concerned in those promises of indulgence by a true tenderness of conscience, this assurance: that as in the first place we have been zealous to settle the uniformity of the Church of England, in discipline, ceremony, and government, and shall ever constantly maintain it, so, as for what concerns the penalties upon those who (living peaceably) do not conform thereunto, through scruple and tenderness of misguided conscience, we shall make it our special care, so far as in us lies, without invading the freedom of parliament, to incline their wisdom at this next approaching session, to

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well the grounds, I doubt not but I shall have your concurrence therein. The truth is, I am in my nature an enemy to all severity for religion and conscience, how mistaken soever it be, when it extends to capital and sanguinary punishments; which I am told were begun in popish times. Therefore, when I say this, I hope I shall not need to warn any here, not to infer from thence that I mean to favour popery. I must confess to you, there are many of that profession, who, having served my father and myself very well, may fairly hope for some part in that indulgence I would willingly afford to others who dissent from us. But let me explain myself, lest some mistake me herein, as I heard they did in my declaration. I am far from meaning by this a toleration, or qualifying them thereby to hold any offices or places of trust in the government. Nay, further, I desire some laws may be made to hinder the growth and progress of their doctrine.

“I hope you have all so good an opinion of my zeal for the Protestant religion, as I need not tell you. I will not yield to any therein, not to the bishops themselves, nor in my liking the uniformity of it, as it is now established; which being the standard of our religion, must be kept pure and uncorrupted, free from all other mixtures. And yet, if the dissenters will demean themselves peaceably and modestly under the government, I could heartily wish I had such a power of indulgence to use upon occasion as might not needlessly force them out of the kingdom; or staying here, give them cause to conspire against the peace of it.”]

Mr. Finch. The next thing we shall show is, that after the king had made this speech, and wished he had such a power of indulgence to use upon occasion, there was a bill

concur with us in the making some such Act for that purpose, as may enable us to exercise, with a more

universal satisfaction, that power of dispensing, which we conceive to be inherent in us.” 1 Ralph, Hist. Eng. 84.

in the House of Lords, brought in to enable the king to dispense with several laws : we shall show you the Journal where it was read and committed ; but further than that it went not.

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L. C. J. What use do you make of this, Mr. Finch ?

Sir Robert Sawyer. You may easily apprehend the use we shall make of it. The king in his speech, says, " He wished he had such a power ; " the House of Lords thought he had not ; and therefore they ordered a bill to be brought in to enable him. We will now show you the bill itself.

[*Clerk* reads from " An Act concerning his Majesty's power in ecclesiastical affairs : "—(z)]

" Whereas, &c. . . . Be it enacted, &c., that the king's Majesty may, by letters patent under the great seal, or by such other ways as to his Majesty shall seem meet, dispense with one act, or law, made the last session of this present parliament, intituled, ' An Act for the uniformity of public prayers,' &c., and with any other laws or statutes concerning the same ; or requiring oaths, or subscriptions ; or which do enjoin conformity to the order, discipline, and worship established in this church, and the penalties in the said laws imposed, or any of them : and may grant licences to such of his Majesty's subjects of the Protestant religion, of whose inoffensive and peaceable disposition his Majesty shall be persuaded, to enjoy and use the exercise of their religion and worship, though differing from the public rule, the said laws and statutes, or any disabilities, incapacities, or penalties, in them, or any of them contained, or any matter or thing to the contrary thereof notwithstanding.

" Provided always, and be it enacted, that no such indulgence, licence, or dispensation hereby to be granted, shall extend, or be construed to extend to the tolerating, or permitting the use or exercise of the popish, or Roman

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Catholic religion in this kingdom; nor to enable any person or persons to hold or exercise any place or office of public trust within this kingdom, who, at the beginning of this present parliament, were, by the laws and statutes of this realm, disabled thereunto; nor to exempt any person or persons from such penalties as are by law to be inflicted upon such as shall publish or preach anything to the deprivation or derogation of the book of Common Prayer, or the government, order, and ceremonies of the church established by law.”]

Sir Robert Sawyer. Here your lordship sees what the Lords did in this matter. We shall now show you, out of the Commons’ Journal, what they did concerning the speech of the king (a).—Show the Journal of the 25th of February, 1662.

[*Clerk reads:—(b)*

“Resolved, &c. That it be presented to the king’s Majesty, as the humble advice of this House, That no indulgence be granted to the dissenters from the Act of Uniformity —”]

Sir Robert Sawyer. Turn to the 27th of February, 1662.

[*Clerk reads the address:—(c)*

“May it please your Majesty, &c.

“After all this, we most humbly beseech your Majesty to believe, that it is with extreme unwillingness and reluctancy of heart, that we are brought to differ from any thing which your Majesty hath thought fit to propose; and though we do no ways doubt but that the unreasonable distempers of men’s spirits, and the many mutinies and conspiracies which were carried on during the late intervals of parliament, did reasonably incline your Majesty to endeavour by your declaration to give some alloy to those ill humours, till the parliament assembled, and the hopes of an indulgence, if the parlia-

(a) *Ante*, p. 447.

(b) 8 Comm. Journ. 440.

(c) 8 Comm. Journ. 442.

ment should consent to it; especially seeing the pretenders to this indulgence did seem to make some title to it by virtue of your Majesty's Declaration from Breda (d); nevertheless, we your Majesty's most dutiful and loyal subjects, who are now returned to serve in parliament, from those several parts and places of your kingdom for which we are chosen, do humbly offer it to your Majesty's great wisdom, that it is in no sort advisable that there be any indulgence to such persons who presume to dissent from the Act of Uniformity and religion established, for these reasons.

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"We have considered the nature of your Majesty's Declaration from Breda, and are humbly of opinion, that your Majesty ought not to be pressed any further.

"Because it is not a promise in itself, but only a gracious declaration of your Majesty's intentions to do what in you lay, and what a parliament should advise your Majesty to do, and no such advice was ever given, or thought fit to be offered; nor could it be otherwise understood, because there were laws of uniformity then in being, which could not be dispensed with but by Act of Parliament."]

Sir Robert Sawyer. This is all that we read this for; your lordship and the jury see what is here declared by the parliament, that the Act of Uniformity

(d) Shortly before the Restoration, while Charles II. was at Breda, in Holland, he made a declaration of amnesty, which contained the following clause, "And because the passion and uncharitableness of the times have produced several opinions in religion by which men are engaged in parties and animosities against each other, which, when they shall hereafter unite in a freedom of conversation, will be composed, or better understood; we do declare a liberty

to tender consciences, and that no man shall be disquieted, or called in question, for differences of opinion in matters of religion, which do not disturb the peace of the kingdom; and that we shall be ready to consent to such an Act of Parliament, as upon mature deliberation, shall be offered unto us for the full granting that indulgence." 1. Ralph, Hist. 5; 2. Rapin, 616; 3. Kennett, 239; Echard, 762.

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could not be dispensed with, without an Act of Parliament.

Next, my lord, we shall show you what was done in the year 1672.—Read the king's speech the 5th of February, 1672.

[*Clerk* reads :—(*e*)

“ My lords and gentlemen ;

“ I am glad to see you here this day. . . . Some few days before I declared the war, I put forth my declaration for indulgence to dissenters (*f*), and have hitherto found a good effect of it, by securing my peace at home, when I had war abroad : there is one part in it that has been subject to misconstructions, which is that concerning the papists, as if more liberty was granted to them than to other recusants, when 'tis plain there is less ; for the others have public places allowed them, and I never intended that they should have any, but only have the freedom of their religion in their own houses, without any concourse of others ; and I could not grant them less than this, when I had extended so much more grace to others, most of them having been loyal, and in the service

(*e*) 12 Lords' Journ. 525.

(*f*) On March 15, 1671, the king published a declaration, in which were the following passages :—

“ We think ourself obliged to make use of that supreme power in ecclesiastical matters, which is not only inherent in us, but hath been declared and recognised to be so by several statutes and Acts of Parliament. . . .

“ We do in the next place declare our will and pleasure to be, that the execution of all, and all manner of penal laws in matters ecclesiastical, against whatsoever sort of nonconformists or recusants, be immediately suspended ; and they are hereby suspended.”

Then came clauses allowing nonconformists to have places for public worship, subject to certain restrictions, followed by this passage :—

“ We do further declare that this our indulgence, as to the allowance of the public places of worship, and approbation of the preachers, shall extend to all sorts of nonconformists and recusants ; except the recusants of the Roman Catholic religion, to whom we shall in no wise allow public places of worship, but only indulge them in their share in the common exemption from the execution of the penal laws, and the exercise of their worship in their private houses only.”

3 Kennett, Hist. 313 ; Echard, 880.

of me, and the king my father: and in the whole course of this indulgence I do not intend that it shall any way prejudice the church, but I will support its rights, and it in its full power.

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“Having said this, I shall take it very ill to receive contradiction in what I have done; and I will deal plainly with you, I am resolved to stick to my declaration.”]

Serj. Pemberton. Now go to the Journal of the Commons of the 14th of February, 1672.

[*Clerk* reads from the address of the House in reply to the foregoing speech.—(g)]

“ And further, we crave leave humbly to represent, that we have, with all duty and expedition, taken into consideration the several parts of your Majesty’s last speech to us; and withal, the declaration therein mentioned for indulgence to dissenters, dated the 15th of March last: and we find ourselves bound in duty to inform your Majesty that penal statutes, in matters ecclesiastical, cannot be suspended but by Act of Parliament.

“We therefore, the knights, citizens, and burgesses of your Majesty’s House of Commons, do most humbly beseech your Majesty, that the said laws may have their free course, until it shall be otherwise provided for by Act of Parliament: and that your Majesty would graciously be pleased to give such directions herein, that no apprehensions or jealousies may remain in the hearts of your Majesty’s good and faithful subjects.”]

Sir Robert Sawyer. Now turn to the 24th of February, 1672, in the same book.

[*Clerk* reads:—(h)]

“Mr. Secretary Coventry reports and presents in writing from his Majesty, his Answer to the humble Petition and

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Address of this House, which was thrice read, and the matter debated, and is as followeth; viz.:

“His Majesty hath received an address from you and he hath seriously considered of it, and returns you this answer, That he is very much troubled, that that declaration which he put out for ends so necessary for the quiet of his kingdom, and especially in that conjuncture, should have proved the cause of disquiet in his House of Commons, and give occasion to the questioning of his power in ecclesiastics, which he finds not done in the reigns of any of his ancestors. He is sure he never had thoughts of using it otherwise than as it hath been entrusted in him, to the peace and establishment of the Church of England, and the ease of all his subjects in general; neither does he pretend to the right of suspending any laws, wherein the properties, rights, or liberties of any of his subjects are concerned, nor to alter any thing in the established doctrine or discipline of the Church of England. But his only design in this, was to take off the penalties the statutes inflicted upon dissenters, which he believes, when well considered of, you yourselves would not wish executed according to the rigour and letter of the law; neither hath he done this with any thought of avoiding or precluding the advice of his parliament; and if any bill shall be offered, which shall appear more proper to attain the aforesaid ends, and secure the peace of the church and kingdom, when tendered in due manner to him, he will show how readily he will concur in all ways that shall appear good for the kingdom.”]

Sir Robert Sawyer. Turn to the 26th of February, 1672.

[*Clerk* reads from the answer of the House to the preceding message of the king:—(i)

“ We do not in the least measure doubt but that your Majesty

had the same gracious intention in giving satisfaction to your subjects, by your answer to our last petition and address: yet, upon a serious consideration thereof, we find that the said answer is not sufficient to clear the apprehensions that may justly remain in the minds of your people, by your Majesty's having claimed a power to suspend penal statutes in matters ecclesiastical, and which your Majesty does still seem to assert, in the said answer, to be intrusted in the Crown, and never questioned in the reigns of any of your ancestors: wherein we humbly conceive your Majesty has been very much misinformed; since no such power ever was claimed or exercised by any of your Majesty's predecessors; and if it should be admitted, might tend to the interrupting the free course of the laws, and altering the legislative power, which hath always been acknowledged to reside in your two Houses of parliament.

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"We, therefore, with an unanimous consent, become again most humble suitors unto your sacred Majesty, that you would be pleased to give us a full and satisfactory answer to our said petition and address, and that your Majesty would take such effectual order, that the proceedings in this matter may not for the future be drawn into consequence or example."]

Sir Robert Sawyer. Now turn to the Lords' Journal, and there your lordship will see, that the king does communicate this address to the Lords, and desires their advice.—Read the 1st of March, 1672.

[*Clerk reads:—(k)*

"His Majesty this day made a short speech, as follows:

"My Lords, you know, that at the opening of this session, I spoke here to your satisfaction: it has notwithstanding begotten a greater disquiet in the House of Commons than I could have imagined.

"I received an address from them, which I looked not

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for, and I made them an answer that ought to have contented them; but, on the contrary, they have made me a reply of such a nature, that I cannot think fit to proceed any further in this matter without your advice.

“‘I have commanded the Chancellor to acquaint you with all the transactions, wherein you will find both me and yourselves highly concerned. I am sensible for what relates to me, and I assure you, my lords, I am not less so for the privilege and the honour of this House.’

“‘To which speech the Lords replied thus:—

“‘We, the Lords spiritual and temporal, in parliament assembled, do unanimously present to your sacred Majesty our most humble thanks, for having been pleased to communicate to us what has passed between your Majesty and the House of Commons, whereby you have graciously offered us the means of showing our duty to your Majesty, and of asserting the ancient just rights and privileges of the House of Peers.’”]

Sir Robert Sawyer. The 3rd of March, 1672, is the next.

[*Clerk reads:—*

“‘The Lord Chancellor reported, that the whole House on Saturday last waited upon his Majesty at Whitehall, and presented the humble address of this House, and his Majesty was pleased to return this answer (*l*).

“‘My Lords, I take this address of yours very kindly; I will always be very affectionate to you, and expect you should stand by me, as I will always be by you.’

“‘Then the House took into consideration the whole matter of his Majesty’s speech on Saturday, and the three papers which his Majesty acquainted this House withal, and all the said papers in their order were read, and after a long debate, it was ordered that this business should be

taken into consideration to-morrow morning, at nine of the clock, the first business.”]

Sir Robert Sawyer. The 4th of March, 1672.

[*Clerk* reads :—

“Next, the House took into consideration the advice to be given to his Majesty, concerning the addresses made to him from the House of Commons (*m*).

“The address of the House of Commons, and his Majesty’s answer were read, and after a long debate, the question being put, whether the king’s answer to the House of Commons, in referring the points now controverted to a parliamentary way by bill, is good and gracious, that being a proper and natural course for satisfaction therein ?

“It was resolved in the affirmative.”]

Sir Robert Sawyer. The 8th of March, 1672.

[*Clerk* reads :—(*n*)

“The Commons being come with their Speaker, his Majesty made this short speech following :

“‘My Lords and Gentlemen ;

“‘If there be any scruple remaining with you concerning the suspension of penal laws, I here faithfully promise you, that what has been done in that particular, shall not for the future be drawn either into consequence or example. And as I daily expect from you a bill for my supply, so I assure you, I shall as willingly pass any other you shall offer me that may tend to the giving you satisfaction in all your just grievances.’

“After which the Lord Chancellor said, ‘There was another particular he thought fit to acquaint them with, which, though it was by his Majesty’s leave, yet it was not by his command : however, he thought it his duty to acquaint the House with it (Mr. Secretary Coventry intending to acquaint the House of Commons with the same), that his Majesty had the last night in pursuance

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of what he then intended, and declared this morning, concerning the suspension of penal laws not being for the future drawn either into consequence or example, caused the original declaration under the Great Seal to be cancelled in his presence, whereof himself and several other lords of the council were witnesses.'”]

Sir Robert Sawyer. Turn to the 10th of March, 1672.

[*Clerk reads:—(o)*

“Ordered, That what my Lord Chancellor said on Saturday last, concerning his Majesty’s causing the vacating his indulgence under the Great Seal of England, shall be entered into the Journal Book of this House as on Saturday last.”]

Sir Robert Sawyer. We shall now come to that which passed in the parliament in 1685.—Read the 9th of November, 1685.

[*Clerk reads:—(p)*

“His Majesty made the following speech :

“‘My Lords and Gentlemen;

“‘Let no man take exceptions that there are some officers in the army not qualified according to the late tests for their employments : the gentlemen, I must tell you, are most of them well known to me ; and having formerly served with me on several occasions, and always approved the loyalty of their principles by their practices, I think them fit now to be employed under me ; and will deal plainly with you, that after having had the benefit of their services in such time of need and danger, I will neither expose them to disgrace, nor myself to the want of them, if there should be another rebellion to make them necessary to me.’”]

Sir Robert Sawyer. Turn to the Commons’ Journal, the 16th of November, 1685.

[*Clerk reads:—(q)*

(o) 12 Lords’ Journ. 550.

(p) 14 Lords’ Journ. 73.

(q) 9 Comm. Journ. 758.

“ Most gracious Sovereign ;

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“ We further crave leave to acquaint your Majesty, that we have with all duty and readiness taken into our consideration your Majesty’s gracious speech to us ; and as to that part of it relating to the officers in the army not qualified for their employment according to an Act of Parliament made in the 25th year of the reign of your Majesty’s royal brother of blessed memory, entitled, An Act for preventing dangers that may happen by popish recusants, we do, out of our bounden duty, humbly represent unto your Majesty, that those officers cannot by law be capable of their employments, and that the incapacities they bring upon themselves thereby, can no ways be taken off but by Act of Parliament.

“ Therefore, out of the great deference and duty we owe unto your Majesty (who has been graciously pleased to take notice of their services to you), we are preparing a bill to pass both Houses for your royal assent, to indemnify them from the penalties they have now incurred ; and because the continuance of them in their employments may be taken to be dispensing with that law without Act of Parliament, the consequence of which is of the greatest concern to the rights of all your Majesty’s dutiful and loyal subjects, and to all the laws made for the security of their religion :

“ We therefore, the knights, citizens, and burgesses of your Majesty’s House of Commons, do most humbly beseech your Majesty, that you would be graciously pleased to give such directions therein, that no apprehensions or jealousies may remain in the hearts of your Majesty’s good and faithful subjects.”]

Mr. Pollexfen. My lord, we pray that these half dozen lines of the statute 1 Eliz. c. 2, may be read.

[The 15th section was here read (r).]

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Serj. Levinz. Now, my lord, the charge is a charge for a libel, and there are two things to be considered.

First, Whether the bishops did deliver this paper to the king? But that we leave upon the evidence that has been given; only we say, there has been no direct proof of that.

In the next place, supposing they did deliver this petition to the king, Whether this be a libel upon the matter of it, the manner of delivering it, or the persons that did it?

And, with submission, this cannot be a libel, although it be true that they did so deliver it.

With your lordship's favour, the subjects have a right to petition the king in all their grievances, so say all our books of law, and so says the stat. 13 Car. 2, st. 1, c. 5, they may petition, and come and deliver their petition under the number of ten, as heretofore they might have done, so that they at all times have a right so to do, and indeed if they had not, it were the most lamentable thing in the world, that men must have grievances upon them, and yet they not to be admitted to seek relief in an humble way.

Now this is a petition setting forth a grievance, and praying his Majesty to give relief. And what is this grievance? It is that command of his, upon my lords the bishops, to distribute the declaration, and cause it to be read in the churches: and let us consider what the effects and consequences of that distribution and reading are; they are to tell the people that they need not submit to the Act of Uniformity, nor to any Act of Parliament made about ecclesiastical matters, for they are suspended and dispensed with. This my lords the bishops must do, if they obey this order; but your lordship sees, if they do it, they lie under an anathema by the statute of 1 Eliz., for there they are under a curse if they do not look to the preservation and observation of that Act: but this command to distribute and read the declaration,

whereby all these laws are dispensed with, is to let the people know, they will not do what the Act requires of them. Now, the bishops lying under this pressure, the weight of which was very grievous upon them, they by petition apply to the king to be eased of it, which they might do as subjects: besides, they are peers of the realm, and were most of them sitting as such in the last parliament, where it was declared such a dispensation could not be; and then in what a case would they have been had they distributed this declaration, which was so contrary to their own actings in parliament? What could they have answered for themselves, had they thus contributed to this declaration, when they had themselves before declared that the king could not dispense? And this was no new thing, for it had been so declared in a parliament before, in two sessions of it, in the late king's reign, within a very little time one of another; and such a parliament that were so liberal in their aids to the Crown, that a man would not think they would go about to deprive the Crown of any of its rights. It was a parliament that did do as great services for the Crown as ever any did, and therefore there is no reason to suspect, that if the king had had such a power, they would have appeared so earnest against it.

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But these are not the beginnings of this matter; for we have showed you from the 15th of Richard II., that there was a power granted by the parliament to the king to dispense with a particular Act of Parliament, which argues, that it could not be without an Act of Parliament: and in 1662, it is said expressly, that they could not be dispensed with but by an Act of Parliament. It is said so again in 1672. The king was then pleased to assume to himself such a power as is pretended to in this declaration; yet upon information from his Houses of Parliament, the king declared himself satisfied that he had no such power, cancelled his declaration, and promised that it should not be drawn into conse-

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quence or example. And so the Commons, by their protestation, said in Richard II.'s time, that it was a novelty, and should not be drawn into consequence or example.

Now if this matter that was commanded the bishops to do, were something which the law did not allow of, surely then my lords the bishops had all the reason in the world to apply themselves to the king, in an humble manner to acquaint him why they could not obey his commands; and to seek relief against that which lay so heavy upon them. Truly Mr. Attorney was very right in the opening of the cause at first, that the government ought not to receive affronts, no, nor the inferior officers are not to be affronted; a justice of the peace, so low a man in office, is not. For a man to say to a justice of peace, when he is executing his office, that he does not right in it, is a great crime: but suppose a justice of peace were making a warrant to a constable, to do something that was not legal for him to do, if the constable should petition this justice of the peace, and therein set forth, Sir, you are about to command me to do a thing which, I conceive, is not legal; surely that would not be a crime that he was to be punished for: for he does but seek relief, and show his grievance in a proper way, and the distress he is under.

There is no law but is either an Act of Parliament, or the common law; for an Act of Parliament, there is none for such a power; all that we have of it in parliamentary proceedings, is against it; and for the common law, so far as I have read it, I never did meet with any thing of such a nature, as a grant or dispensation that pretended to dispense with any one whole Act of Parliament; but here, my lord, is a dispensation that dispenses with a great many laws at once, truly I cannot take upon me to tell how many, there may be forty or above, for aught I know.

Therefore the bishops lying under such a grievance as

this, and under such a pressure, being ordered to distribute this declaration in all their churches, they lying under such obligations to the contrary, as they did; if they did deliver this petition (publishing of it I will not talk of, for there has been no proof of a publication, but a delivering of a petition to his Majesty in the most secret and decent manner that could be imagined), my lords the bishops are not guilty of the matter charged upon them in this information. It has been expressly proved, that they did not go to disperse it abroad, but only delivered it to the king himself: and, in short, if this should be a libel, I know not how sad the condition of us all would be, if we may not petition when we suffer.

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Mr. Finch. My lord, we shall leave it upon this point; to suspend law is all one as to abrogate laws; for so long as a law is suspended, whether the suspension be temporary, or whether it be for ever, whether it be at once, or at several times, the law is abrogated to all intents and purposes: but the abrogation of laws is part of the legislature, that legislative power is lodged in King, Lords, and Commons. Therefore the defendants, finding this order made upon them to publish this declaration, did what in duty they were bound to do; and unless the jury do find, that they have done that which is contrary to law, and to the duty of their places, and that this petition is a libel and a seditious libel, with an intent to stir up sedition among the people, my lords the bishops can never be found guilty upon this information.

Sir R. Sawyer. Pray, my lord, favour me a word before we conclude. I find very few attempts of this nature in any king's reign. In the reign of Henry IV., there was an Act of Parliament(s) that foreigners should have a free trade in the city of London, notwithstanding the franchises of London: after the parliament rose, the king issued out his proclamation, forbidding the execution of

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that law, and commanding that it should be in suspense, *usque ad proximum Parliamentum*; yet that was held to be against law.

L. C. J. That which you are to look to, is the publishing of this paper, and whether it be a libel or no. And as to the business of the parliament you mentioned, that is not to the purpose.

Sir R. Sawyer. My lord, I say, I would put it where the question truly lies; if they don't dispute the point, then we need not labour it; but I don't know whether they will or no, and therefore I beg your lordship's favour to mention one case more, and that is upon the stat. 31 Hen. 8, c. 8, which enables the king by proclamation, in many cases, to create the law; which statute was repealed by 1 Edw. 6, c. 12. That very act does recite, that the law is not to be altered, or restrained, but by Act of Parliament; and therefore the parliament enables the king to do so and so: but that was such a power, that the parliament thought not fit to continue, and it was afterwards repealed; but it shows, that at that time the parliament was of the same opinion, as to this matter, that other parliaments have been since.

Mr. Somers. My lord, I would only mention the great case of *Thomas v. Sorrel* (t) in the Exchequer Chamber, upon the validity of a dispensation of the statute of Edward VI., touching selling of wine. There it was the opinion of every one of the judges, and they did lay it down as a settled position, that there never could be an abrogation, or a suspension (which is a temporary abrogation) of an Act of Parliament, but by the legislative power. That was a foundation laid down quite through the debate of that case. Indeed it was disputed, how far the king might dispense with the penalties in such a particular law, as to particular persons; but it was agreed by all, that the king had no power to suspend any law:

(t) Vaughan, 330; *post*, p. 494.

and, my lord, I dare appeal to Mr. Attorney-General himself, whether, in the case of *Godden v. Hales* (u), which was lately in this court, to make good that dispensation, he did not use it as an argument, that it could not be expounded into a suspension: he admitted it not to be in the king's power to suspend a law, but that he might give a dispensation to a particular person, was all that he took upon to justify him at that time.

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That the matters of fact alleged in the petition are perfectly true, we have shown by the journals of both Houses. In every one of those years which are mentioned in the petition, this power of dispensation was considered in parliament, and, upon debate, declared to be contrary to law: there could be no design to diminish the prerogative, because the king hath no such prerogative. Seditious the petition could not be, nor could it possibly stir up sedition in the minds of the people, because it was presented to the king in private and alone; false it could not be, because the matter of it is true: there could be nothing of malice in it, for the occasion was not sought: the thing was pressed upon them; and a libel it could not be, because the intent was innocent, and they kept within the bounds set by Act of Parliament, that gives the subject leave to apply to his prince by petition, when he is aggrieved.

Att. Gen. My lord, the counsel for the defendants have let themselves into large discourses, making great complaints of the hardships put upon my lords the bishops, by the order of council, to read his Majesty's declaration; and putting these words into the information, seditious, malicious, and scandalous: but I admire that Sir Robert Sawyer should make such reflections and observations upon these words, when I am sure he will scarce find any one of his own exhibiting, that has so few of those aggravating words as this has; and therefore that might have

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(u) 11 St. Tr. 1165; S. C. 2 Show. 475.

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been very well spared, especially by him. In the next place, we are told what great danger our religion is in by this declaration: I hope we have an equal concern for that with them, or any person else whatsoever. But, however, I am sure our religion teaches us, not to preserve our religion, or our lives, by any illegal courses; and the question is, whether the course that my lords the bishops have taken to preserve, as they say, our religion, be legal or not? If it be not legal, then I am sure our religion will not justify the using such a course for never so good an end. For the thing itself, I do admire that they, in so long a time and search that they have made, should not produce more precedents of such a paper as this is. They challenge us to show, that ever there was any such declaration as this: I'll turn the same challenge upon them. Show me any one instance, that ever so many bishops did come, under pretence of a petition, to reflect upon the king out of parliament.

But those few instances that they have produced, are nothing at all to this matter that is now upon trial before your lordship and this jury; nay, there are evidences against them; for they are only matters transacted in parliament, which are no more to be applied to this thing that is in controversy now, than any the most remote matter that could be thought of; and though they have gone so high in point of time, as to the reign of Richard II., yet they have nothing between that and the late king's reign, to which they have at last descended down.

But I say that all the talk of Richard II.'s time is wholly out of the case: truly, I do not doubt but in Richard II.'s time they may find a great many instances of some such sort of petitioning as this; for our histories tell us, that at that time they had 40,000 men in arms against the king; and we know the troubles that were in that king's reign, and how at length he was deposed: but certainly there may be found instances more applicable to

the case, than those they produce. As for those in king Charles II.'s time, do they anyways justify this petition? For now they are upon justifying the words of their petition, that this power has been declared to be illegal in 1662, 1672, and 1685.

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For what was done in 1662? do they show anything more than some debates in the House of Commons, and at last an address, an answer by the king, a reply of the Commons, and then the thing dies? Pray, my lord, is a transaction in the House of Commons, a declaration of parliament? Sure, I think, no one will affirm that anything can be a declaration of parliament unless he that is the principal part concurs, who is the king: for if you speak of the court of parliament in a legal sense, you must speak of the whole body, King, Lords, and Commons, and a declaration in parliament must be by all the whole body; and this is properly an Act of Parliament.

Why then they come to the year 1672, where your lordship observes, that the late king did insist upon his right; for after the dispute, which was in 1662, his Majesty did issue out another declaration, and when it comes to be debated in parliament, he insists upon his right in ecclesiastical matters; and though his declaration was cancelled, yet there is no formal disclaimer of the right.

How far these things that they have offered may work as to the point that they have debated, I shall not now meddle with it, because it is not at all pertinent to the case in question.

L. C. J. Yes, Mr. Attorney, I'll tell you what they offer, which it will lie upon you to give an answer to; they would have you show how this has disturbed the government, or diminished the king's authority.

Att. Gen. Whether a libel be true or not, as to the matter of fact, was it ever yet in any court of justice permitted to be made a question whether it be a libel or

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not? or whether a party be punishable for it? And therefore I wonder to hear these gentlemen say, that because it is not a false one, therefore it is not a libel. Suppose a man should speak scandalous matter of any noble lord here, or of any of my lords the bishops, and a *scandalum magnatum* be brought for it, though that which is spoken has been true, yet it has been the opinion of the courts of law, that the party cannot justify it, by reason it tends to the disturbing of the peace, to publish anything that is matter of scandal: the only thing that is to be looked into, is, whether there be anything in this paper that is reflecting and scandalous, and not whether it be true or no? for if any man shall extra-judicially, and out of a legal course and way, reflect upon any of the great officers of the kingdom, nay, if it be put upon any inferior magistrate, he is to be punished, and is not to make his complaint against them, unless he do it in a proper way. A man may petition a judge; but if any man in that petition shall come and tell the judge, Sir, you have given an illegal judgment against me, and I cannot in honour, prudence, or conscience, obey it; I do not doubt, nor will any man, but that he that should so say, would be laid by the heels, though the judgment perhaps might be illegal.

If a man shall come to petition the king, as we all know the council doors are thronged with petitioners every day, and access to the king by petition is open to everybody, the most inferior person is allowed to petition the king; but because he may do so, may he therefore suggest what he pleases in his petition? Shall he come and tell the king to his face what he does is illegal? I only speak this because they say, in this case, his Majesty gave them leave to come to him to deliver their petition; but the king did not understand the nature of their petition, I suppose, when he said he gave them leave to come to him.

For this matter we have authority enough in our books;

particularly there is the *Case of Wraynham (v)*. The Lord Chancellor had made a decree against him, and he petitioned the king that the cause might be re-heard; and in that petition he complains of injustice done him by my Lord Chancellor, and he put into his petition many reflecting things. This was punished as a libel in the Star Chamber: and in that book it was said, though it be lawful for the subject to petition the king against any proceedings by the judges, yet it must not be done with reflections, nor with words that turn to the accusation or scandal of any of the king's magistrates or officers, and the justice of the decree is not to be questioned in the case; for there Wraynham, in his defence, would have opened the particulars wherein he thought the decree was unjust, but that the court would not meddle with, nor would allow him to justify for such illegality in the decree: so in this case, you are not to draw in question the truth or falsehood of the matter complained against; for you must take the way the law has prescribed, and prosecute your right in a legal course, and not by scandal or libelling.

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There is a great deal of difference between not doing a thing that is commanded, if one be of opinion that it is unlawful, and coming to the king with a petition highly reflecting upon the government, and with scandalous expressions telling him, Sir, you act illegally; you require of us that which is against prudence, honour, or conscience, as my lords the bishops are pleased to do in this petition of theirs. I appeal to any lord here, that if any man should give him such language, either by word of mouth or petition, whether he would bear it, without seeking satisfaction or reparation by the law.

There is one thing that appears upon the face of the information, which shows this not to be the right course; and if my lords the bishops had given themselves the

(v) See *Proceedings against Mr. Chancellor Bacon of Injustice*, 2 St. Wraynham for slandering the Lord Tr. 1059.

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opportunity of reading the declaration seriously, they would have found in the end of the declaration, that the king was resolved to call a parliament in November. Might not my lords the bishops have acquiesced under their passive obedience till the parliament met? But nothing would serve them but this, and this must be done out of parliament, for which there is no precedent can be shown, and this must be done in such a manner as your lordship sees the consequence of, by your trouble of this day.

There is one thing I forgot to speak to : they tell us that it is laid malicious and seditious, and there is no malice or sedition found ; we know very well that that follows the fact, those things arise by construction of law out of the fact. If the thing be illegal, the law says it is seditious ; a man shall not come and say, he meant no harm in it ; that was the *Case of Williams* (x). In his treasonable book, says he, I only intended to warn the king of the danger approaching, and concludes his book with God save the king ; but no man will say that a good preface at the beginning, or a good prayer at the end, should excuse treason or sedition in the body of a book. If I meet another man in the street and kill him, though I never saw him in my life, the indictment is, that it was *ex malitiâ præcogitatâ*, as it often happens that a person kills one he never had acquaintance with before ; and *in favorem vitæ*, if the nature of the fact be so, the jury are permitted to find according to the nature of the case ; but in strictness of law there is malice implied : but, my lord, I think these matters are so common, and that is a point that has been so often settled, that the form of the indictment and information must follow the nature of the fact, that I need not insist upon it ; if the act be unlawful, the law supplies the malice and evil intention.

(x) 2 St. Tr. 1085 ; S. C. 2 Rolle, 88.

Sol. Gen. My lord, and gentlemen of the jury, I am of counsel in this case for the king, and I shall take leave to proceed in this method : first, I shall put the case of my lords the bishops, and then consider the arguments that have been used in their defence, and answer as much as is material to be answered ; and then leave it to your lordship, and the jury's consideration, whether what has been said by these gentlemen weigh anything in this case.

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First, I take it for granted, and I think the matter is pretty plain by this time, by my lord president's evidence, and their own confession, that it is not to be disputed, but that this paper was presented by some of my lords the bishops to the king : I think there is no great difficulty in that matter : I just touch upon it, because I would follow them in their own method.

Then let us take this case as it is, upon the nature of the petition, and the evidence that they have given, and consider whether it will justify all that is done. For the business of petitioning, I would distinguish and inquire, whether my lords the bishops out of parliament can present any petition to the king ? I do agree, that in parliament the Lords and Commons may make addresses to the king, and signify their desires, and make known their grievances there ; and there is no doubt but that is a natural and proper way of application : for in the beginning of the parliament, there are receivers of petitions appointed, and upon debates, there are committees appointed to draw up petitions and addresses ; but to come and deduce an argument, that because the lords in parliament have done thus (there being such methods of proceedings usual in parliaments) therefore my lords the bishops may do it out of parliament, that is certainly a *non sequitur*, no such conclusion can be drawn from those premises.

My lord, I shall endeavour to lay the fact before you as it really is, and then consider what is proper for the

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court to take notice of, as legal proof or evidence : and I take it, all those precedents that they have produced of what the Lords did, and what the Commons did in parliament, is no warrant for them to shelter themselves under, against the information in question (*y*).

The Lords may address the king in parliament, and the Commons may do it, but therefore that the bishops may do it out of parliament, does not follow. I heard nothing said that could have given colour to such a thing, but the curse that has been read in 1 Eliz.

But pray, my lord, let us consider the evidence they have given : they have begun with that record in Richard II.'s time, and what is that ? That the king may dispense with the statute of provisors till the meeting of the next parliament, and a protestation of the Commons at the end of it ; whether that be an Act of Parliament that is declaratory of the Common Law, or introductory of a new law, *non constat* ; and, for aught appears, it might be a declaratory act ; and if so, it is a proof of the king's prerogative of dispensing. It might be an act in affirmance of the king's prerogative, as there are a great many such, we very well know ; and generally most of the laws in that kind, are in affirmance of the king's power ; so that the law turns as an argument for the king's prerogative, and they have given him that which will turn upon themselves ; so it stood in Richard II.'s time ; but whether that be an argument one way or other conclusive, is left to your lordship and the jury.

Ay, but say they, there is no execution of such a power till very lately, and the first instance that they produce is that in the year 1662. But your lordship knows, that

(*y*) Here Mr. Justice Powell spake aside to the Lord Chief Justice thus :
" My Lord, this is strange doctrine !
Shall not the subject have liberty to petition the king but in parliament ?

If that be law, the subject is in a miserable case."

L. C. J. " Brother, let him go on, we will hear him out, though I approve not of his position."

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before the reign of Henry IV., there was great jurisdiction assumed by the Lords in original causes: then comes the statute of appeals (z), which takes notice, that before that time the Lords had assumed an original jurisdiction in all causes, and would proceed and determine them in parliament and out of parliament; and it fell out to be so great a grievance, that it was thought necessary to make a law against it, that appeals in parliament should be abolished and destroyed; and then comes that law in favour of the subject of England, and that settles the bounds between the King and the Lords in a great measure. Before that time the Lords were grown very powerful, and where there is power, there always will be applications; and what is the effect of that statute, 1 Hen. 4? For all that we endeavour is, to make things as plain as can be, that no further applications, no accusations, no proceedings in any case whatsoever be before the Lords in parliament, unless it be by impeachment of the Commons, to that there is the *salvo*; and the use that I make of it is this, the Commons, by that very statute, did abolish the power that the Lords had arrogated to themselves, and ordered, that they should not meddle with any cause, but upon the impeachment of the House of Commons, and establish the impeachment of the Commons, which is as ancient as the parliament, for no one ever yet spoke against the power of the Commons impeaching any person under the degree of the prince; and that is the regular legal way, and so the Commons asserted their ancient right, and whatsoever the Lords took notice of, must come by application of the Commons; then conferences were to pass between the Houses, and both Houses by address apply to the King. This is the proper way and course of parliament; it is a venerable, honourable way: and this is the course that should have been taken by my Lords here, and they should

(z) 1 Hen. 4, c. 14.

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have stayed till the complaint had come from the Commons in parliament, and then it had been regular for them to address the king; but they were too quick, too nimble.

And whereas the statute of Henry IV. says, that no Lord whatsoever shall intermeddle with any cause, but by the impeachment of the Commons; they interpose and give their advice before their time; if there be any irregularity in parliament, or out of parliament, the Commons are to make their complaint of it, and a man must not be his own judge, nor his own carver, nor must every man create difficulties of his own, nor set upon petitioning in this sort: but there I lay my foundation, that in such a matter as this, there ought to have been the impeachment of the Commons in parliament before these Lords could do anything; and I know nothing can be said for the bishops more than this, that they were under an anathema, under the curse that Sir Robert Sawyer speaks of; and for fear of that, they took this irregular course.

My Lord, the defendants find fault with the words in the information, and they say, why are these words put in, seditious, malicious? If the matter be libellous and seditious, we may lawfully say so, and it is no more than the law speaks, it results out of the matter itself; and, if it be a libellous paper, the law says, it is maliciously and seditiously done; and these gentlemen need not quarrel with us, for so are all the informations in all times past, and it is no more than the *vi et armis*, which is the common form. It may be said, how can the publishing of a libel be said to be done *vi et armis*? That is only a supposition of law, and they may as well object to the conclusion of the information, that it was *contra coronam et dignitatem domini regis*. If it be an illegal thing, or a libel, these are necessary consequences; it is no more than the speaking of the law upon the fact.

But let us a little consider, whether this matter were warrantable. The defendants pretend it was done upon

this account, That the king had set forth a declaration, and had ordered them to read it ; which to excuse themselves from, they make this petition, or this libel (call it what you will), and they use this as the main argument, that they say the king has done illegally, and they tell the king plainly so ; for they take notice of this declaration, and say, it is illegal, because it is contrary to the declarations of parliament in 1662, 1672, and 1685.

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Pray let us consider a little, whether there be any declaration in parliament that they have given evidence of? Have they read any declaration of the parliament in 1662? What is a declaration in parliament, but a bill that is passed by the King, Lords, and Commons? That we know to be the meaning, and no other. If it pass the Commons, it is no declaration in parliament ; nay, if it pass the Lords and Commons, it is not a declaration in parliament, except it also pass the King. All these things are nullities, and the law takes no notice of them.

Now let us consider what there is in this case upon this evidence ; for that in 1662, is only a vote and opinion of the House of Commons ; and I always understood, and have been told so by some of the gentlemen of the other side, that such a vote signifies nothing. But here is a mighty argument used from the king's speech, that because he wished he had such a power, this must be declared in parliament that he had no such power. Is the speech of the prince a declaration to parliament? All the speeches that were made upon the opening of the parliament, will you say they are declarations in parliament? Then the chancellor's, or the keeper's speech, or the lord privy seal's, must be a declaration in parliament. Whoever speaks the sense of the king, if he does not speak that which is law and right, is questionable for it, and several have been impeached for so doing ; for they look not upon it as the king's speech, except it be according to law. Nothing can turn upon the prince but what

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is legal ; if it be otherwise, it turns upon him that speaks it. I never did hear that a speech made by the Chancellor (and I will appeal to all the Lords that hear me in it) was a declaration in parliament.

Then, my lord, we come to the business in 1672, which with that in 1662, and that in Breda, shows that this of the king's is not such a novelty, but has been done often before. In 1672, the king was in distress for money, being entangled in a Dutch war, and wanted supply : he capitulates with his Commons (you have heard it read), and, upon the Commons' address, he asserts it to be his right, and makes his complaint to the Lords how the Commons had used him ; for when he gives them a fair answer, they replied, and there are conferences with the Lords about it ; but at length it all ends in a speech by the king, who comes and tells them of his present necessities, and so he was minded to remit a little at the instigation of the Commons, and he has a good lump of money for it. Would this amount to a declaration in parliament ? Can my lords the bishops fancy or imagine that this is to be imposed upon the king, or upon the court, for a declaration in parliament ?

Then last of all, for that in 1685, in this king's time, what is it ? The Commons make an address to the king, and complain to his Majesty of some of his officers in his army (*a*), that might pretend to have a dispensation, something of that nature contrary to the Test Act ; and what is done upon it ? They make their application to the king, and the king answers them, and that is all : but since it is spoken of in the court, I would take notice that

(*a*) Here Mr. Justice Powell observed to the Lord Chief Justice, "My Lord, this is wide, Mr. Solicitor would impose upon us : let him make it out if he can, that the king has such a power, and answer the objections made by the defendants'

counsel."

L. C. J. "Brother, impose upon us ! He shall not impose upon me ; I know not what he may upon you ; for my part, I do not believe one word he says."

it is very well known by the case of *Godden v. Hales* (b), the judgment of the court was against the opinion of that address.

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It will not be denied that the king may, by his prerogative royal, issue forth his proclamation (c); it is as essential a prerogative as it is to give his assent to an Act of Parliament to make it a law. And it is another principle, which I think cannot be denied, that the king may make constitutions and orders in matters ecclesiastical; and that these he may make out of parliament, and without the parliament. If the king may do so, and these are his prerogatives, then suppose the king do issue forth his royal proclamation (and such in effect is this declaration under the great seal) in a matter ecclesiastical, by virtue of his prerogative royal; and this declaration is read in the council, and published to the world, and then the bishops come and tell the king, Sir, you have issued out an illegal proclamation or declaration, being contrary to what has been declared in parliament, when there is no declaration in parliament; is not this a diminishing the king's power and prerogative in issuing forth his proclamation or declaration, and making constitutions in matters ecclesiastical? Is not this a questioning of his prerogative? Do not my lords the bishops in this case raise a question between the king and the people? Do not they, as much as in them lies, stir up the people to sedition? For who shall be judge between the king and the bishops? Says the king, I have such a power and prerogative to issue forth my royal proclamation, and to make orders and constitutions in matters ecclesiastical, and that without the parliament, and out of parliament. Say my lords the bishops, You have done so, but you have no warrant for it. Says the king, Every prince has done it, and I have done no more than what is

(b) 11 St. Tr. 1165; S. C. 2 Show.

(c) *Ante*, pp. 371, *et seq.*

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my prerogative to do. But this, say the bishops, is against law. How shall this be tried? Should not the bishops have had the patience to have waited till a parliament came and complained there, and sought redress? The question in this case is not whether the king may dispense with the law, but whether he may issue out his proclamation in matters ecclesiastical.

The king himself tells them that he would have a parliament in November at furthest, yet they have no patience to stay till November, at which time this power of dispensing with the law might very properly and naturally be examined and redressed, but my lords the bishops make this application to him himself, complaining to himself against himself, by accusing him of an illegal procedure. Is not this raising a question upon the king's prerogative in issuing forth declarations? and upon the king's power and right in matters ecclesiastical? Doth not this tend to stir up sedition? That they have so done is pretty plain: and for the consequence of it time will show it. I shall appeal to the case in 2 Cro. Jac. 37. That is a plain, direct authority for me.

Just. Powell. Nay, Mr. Solicitor, we all very well know, to deny the king's authority in temporals and spirituals, as by Act of Parliament, is high treason.

Sol. Gen. I carry it not so far, sir. We have a gracious prince, and my lords the bishops find it so by this prosecution: but what says that case? It is printed in Noy, 100, and in Mr. Just. Croke, 37: what says that case? The king may make orders and constitutions in matters ecclesiastical.

Now, my lord, I come to that which is very plain from the case *De Libellis Famosis* (d): if any person have slandered the government in writing, you are not to examine the truth of that fact in such writing, but the slander which it imports to the king or government; and

be it never so true, yet if slanderous to the king or the government, it is a libel, and to be punished; in that case, the right or wrong is not to be examined, or if what was done by the government be legal or no; but whether the party have done such an act. If the king have a power (for still I keep to that) to issue forth proclamations to his subjects, and to make orders and constitutions in matters ecclesiastical, if he do issue forth his proclamation, and make an order upon the matters within his power and prerogative; and if any one would bring that power in question otherwise than in parliament, that the matter of that proclamation be not legal, I say that is sedition, and you are not to examine the legality or illegality of the order or proclamation, but the slander and reflection upon the government, and that, I think, is very plain from the case *De Libellis Famosis*; for it says, If a person do a thing that is libellous, you shall not examine the fact but the consequence of it; whether it tended to stir up sedition against the public, or stir up strife between man and man, in the case of private persons: as if a man should say of a judge, he has taken a bribe, and I will prove it.

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If it be so in the case of an inferior magistrate, what must it be in the case of a king? To come to the king's face, and tell him, as they do here, that he has acted illegally, doth certainly sufficiently prove the matter to be libellous. What do they say to the king? They say and admit, that they have an averseness for the declaration, and they tell him whence that averseness doth proceed: and yet they insinuate that they had an inclination to gratify the king, and embrace the dissenters, that were as averse to them as could be, with due tenderness, when it should be settled by parliament and convocation. Pray what hath their convocation to do in this matter?

L. C. J. Mr. Solicitor-General, I will not interrupt you; but pray come to the business before us. Show

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us that this is in diminution of the king's prerogative, or that the king ever had such a prerogative.

Sol. Gen. I will, my lord, I am observing what it is they say in this petition—They tell the king it is inconsistent with their honour, prudence, and conscience, to do what he would have them to do: And if these things be not reflective upon the king and government, I know not what is. This is not in a way of judicature: possibly it might have been allowable to petition the king to put it into a course of justice, whereby it may be tried; but alas! there is no such thing in this matter.

It is not their desire to put it into any method for trial, and so it comes in the case *De Libellis Famosis*; for by this way they make themselves judges, which no man by law is permitted to do. My lords the bishops have gone out of the way, and all that they have offered does not come home to justify them; and therefore I take it, under favour, that we have made it a good case for the king: We have proved what they have done, and whether this be warrantable or not, is the question, gentlemen, that you are to try. The whole appears upon record; the declaration and petition are set forth, and the order of the king and council. When the verdict is brought in, they may move anything that they please in arrest of judgment. They have had a great deal of latitude, and taken a great deal of liberty; but truly, I apprehend, not so very pertinently; but, I hope, we have made a very good case of it for the king, and that you, gentlemen, will give us a verdict.

Just. Holloway. Mr. Solicitor, there is one thing I would fain be satisfied in: You say the bishops have no power to petition the king.

Sol. Gen. Not out of parliament, sir.

Just. Holloway. Pray give me leave, sir. The king having made such a declaration of general toleration and liberty of conscience, afterwards comes and requires the bishops to disperse this declaration; this, they say out of

a tenderness of conscience, they cannot do, because they apprehend it is contrary to law, and contrary to their function: what can they do, if they may not petition?

Sol. Gen. If they were commanded to do anything against their consciences, they should have acquiesced till the meeting of the parliament.

L. C. J. Truly, Mr. Solicitor, I am of opinion that the bishops might petition the king; but this is not the right way of bringing it in. I am not of that mind that they cannot petition the king out of parliament; but if they may petition, yet they ought to have done it after another manner: for if they may in this reflective way petition the king, I am sure it will make the government very precarious.

Just. Powell. Mr. Solicitor, it would have been too late to stay for a parliament; for it was to have been distributed by such a time.

Sol. Gen. They might have lain under it and submitted.

Just. Powell. No, they would have run into contempt of the king's command, without petitioning the king not to insist upon it; and if they had petitioned, and had not shown the reason why they could not obey, it would have been looked upon as a piece of sullenness, and that they would have been blamed for as much on the other side.

Serj. Baldock. I cannot deny, nor shall, that the subject has a right to petition; but I shall affirm also that he has a duty to obey; and that, in this case, the power of the king to dispense with penal laws in matters ecclesiastical, is not a thing that is in question, nor need we here have had these long debates on both sides. It may be perceived plainly, by the proofs that have been read, that the kings and princes have thought themselves that they had such a power, though it may be the parliament thought they had not; and therefore the declarations of the one or the other I shall not meddle with. That

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power itself which the king has, as king of this realm, in matters rather ecclesiastical and criminal, than of property, may somewhat appear by what has been read before your lordship. But all this will be nothing in our case, neither has his majesty now depended so much upon this thing. The declaration has been read to you. The king there says, that for those reasons he was ready to suspend those laws; and be they suspended. Yet, my lord, with this too, that he refers it to, and hopes to make it secure by, a parliament. So that there being this, it has not gone, I think, very far; and it not having been touched here, it is not a point of duty in my lords the bishops, as bishops, that's here inquired into. Whether they should have meddled with this or no, in this manner, is the question. That the king is supreme over all of us, and has a particular supremacy over them, as supreme ordinary governor and moderator of the church, is very plain; and, my lord, it is as plain, that in such things as concern the church, he has a particular power to command them. This is not unknown, but very frequent and common in matters ecclesiastical, and matters of state. It is not here a question now, whether these declarations which they were commanded to get read, were legal or not legal? What prudence there was, what honour there was, what conscience there was, for their not reading it, is not the question neither; but the point was, the king as supreme ordinary of his kingdom (to whom the bishops are subject), does in council order; and what is it he orders? Their sending out and distributing his declaration. They were concerned in no more than that, and it had been a very petty thing, a small thing, to send out the king's declaration to be read by the clergy. All the clergy were ordered to read it, but my lords the bishops were only commanded to distribute it. And if this be not an evil in itself, and if it be not against the word of God, certainly obedience was due from my lords the bishops; active obedience was due from them to do so much as this. It

was no consent of theirs, it was no approbation of theirs of what they read, that was required.

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Recorder. That which I would urge, my lord, is only this: As peers, it is said the defendants have a right to petition and advise the king; but that is no excuse at all; for if their petition contains matter reproachful or scandalous, it is a libel in them as well as in any other subject; and they have no more right to libel the king than his majesty's other subjects have; nor will the privilege of their peerage exempt them from being punished. And for the form of this paper, as being a petition, there is no more excuse in that neither; for every man has as much right to publish a book, or pamphlet, as they had to present their petition.

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Just. Holloway. Pray, Mr. Recorder, don't compare the writing of a book to the making of a petition; for it is the birthright of the subject to petition.

The Lord Chief Justice then proceeded to sum up as follows:—This is a case of very great concern to the king and the government on the one side, and to the bishops on the other; and I have taken all the care I can to observe what has been said on both sides. It is not to be expected that I should repeat all the speeches, or the particular facts, but I will put the jury in mind of the most material things, as well as my memory will give me leave; but I have been interrupted by so many long and learned speeches, and by the length of the evidence which has been brought in in a very broken, unmethodical way, that I shall not be able to do so well as I would.

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Gentlemen, thus stands the case. This is an information against my lords the bishops for preferring, composing, making, and publishing, and causing to be published, a seditious libel. The information is special, and states that the king was graciously pleased, by his royal power and prerogative, to set forth a declaration of indulgence for liberty of conscience, in the third year of his reign;

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and afterwards, upon the 27th of April, in the fourth year, he comes and makes another declaration; and afterwards, in May, orders in council that this declaration should be published by the bishops in their several dioceses; and after this was done the bishops come and present a petition to the king, in which were contained the words which you have seen.

The question then arose about the publishing of it, whether my lords the bishops had published it? And it was insisted upon that nobody could prove the delivery of it to the king. It was proved the king gave it to the council, and my lords the bishops were called in, and there they acknowledged their hands; but nobody could prove how it came to the king's hands. Upon which we were all of opinion that it was not such a publishing as was within the information; and I was going to have directed you to find my lords the bishops not guilty: but it happened that being interrupted in my directions by an honest, worthy, learned gentleman, the king's counsel took the advantage, and informing the court that they had further evidence for the king, we stayed till my lord president came, who told us how the bishops came to him to his office at Whitehall, and after they had told him their design, that they had a mind to petition the king, they asked him the method they were to take for it, and desired him to help them to the speech of the king; and he tells them he will acquaint the king with their desire, which he does; and, the king giving leave, he comes down and tells the bishops that they might go and speak with the king when they would; and, says he, I have given direction that the door shall be opened for you as soon as you come. With that the two bishops went away, and said they would go and fetch their other brethren, and they did bring the other four, but my lord archbishop was not there; and immediately when they came back they went up into the chamber, and there a petition was delivered to the king. He cannot speak to

that particular petition, because he did not read it, and that is all that he knew of the matter; only it was all done the same day, and that was before my lords the bishops appeared at the council.

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Gentlemen, after this was proved, then the defendants came to their part; and these gentlemen that were of counsel for my lords let themselves into their defence, by notable learned speeches, by telling you that my lords the bishops are guardians to the church, and great peers of the realm, and were bound in conscience to take care of the church. They have read you a clause of a statute made in queen Elizabeth's time, by which they say my lords the bishops were under a curse if they did not take care of that law. Then they show you some records: one in Richard II.'s time, which was a liberty given to the king to dispense with the statute of provisors. Then they show you some journals of parliament; first in the year 1662, where the king had granted an indulgence, and the House of Commons declared it was not fit to be done, unless it were by Act of Parliament; and they read the king's speech, wherein he says he wished he had such a power; and so likewise that in 1672; which is all nothing but addresses and votes, or orders of the house, or discourses; either the king's speech, or the subjects' addresses; but these are not declarations in parliament. That is insisted upon by the counsel for the king, that what is a declaration in parliament is a law, and that must be by the king, lords, and commons. The other is but common discourse, but a vote of the house, or a signification of their opinion, and cannot be said to be a declaration in parliament. Then they come to that in 1685, where the Commons take notice of something about the soldiers in the army that had not taken the test, and make an address to the king about it; but in all these things (as far as I can observe) nothing can be gathered out of them one way or the other. It is nothing but discourses. Sometimes this dispensing power has been allowed, as in

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Richard II.'s time, and sometimes it has been denied, and the king did once waive it.

But those concessions which the king sometimes makes for the good of the people, and sometimes for the profit of the prince himself (but I would not be thought to distinguish between the profit of the prince and the good of the people, for they are both one; and what is the profit of the prince is always for the good of the people), but I say those concessions must not be made law, for that is reserved in the king's breast, to do what he pleases in it at any time.

The truth of it is, the dispensing power is out of the case. It is only a word used in the petition, and I will not take upon me to give my opinion in the question, to determine that now, for it is not before me. The only question before me is, and so it is before you, gentlemen, it being a question of fact, whether here be a certain proof of a publication? And then the next question is a question of law indeed, whether, if there be a publication proved, it be a libel?

Gentlemen, upon the point of the publication, I have summed up all the evidence to you; and if you believe that the petition which these lords presented to the king was this petition, truly, I think, that is a publication sufficient. If you do not believe it was this petition, then my lords the bishops are not guilty of what is laid to their charge in this information, and consequently there needs no inquiry whether they are guilty of a libel. But if you do believe that this was the petition they presented to the king, then we must come to inquire whether this be a libel.

Now, gentlemen, anything that shall disturb the government, or make mischief and a stir among the people, is certainly within the case *De Libellis Famosis*; and I must in short give you my opinion. I do take it to be a libel. Now this being a point of law, if my brothers have anything to say to it, I suppose they will deliver their opinions.

Just. Holloway. The question is, whether this petition of my lords the bishops be a libel or no. Gentlemen, the end and intention of every action is to be considered; and likewise, in this case, we are to consider the nature of the offence that these noble persons are charged with. It is for delivering a petition, which, according as they have made their defence, was with all the humility and decency that could be: so that if there was no ill intent, and they were not (as it is not, nor can be pretended they were) men of evil lives, or the like, to deliver a petition cannot be a fault, it being the right of every subject to petition. If you are satisfied there was an ill intention of sedition, or the like, you ought to find them guilty; but if there be nothing in the case that you find, but only that they did deliver a petition to save themselves harmless, and to free themselves from blame, by showing the reason of their disobedience to the king's command, which they apprehended to be a grievance to them, and which they could not in conscience give obedience to, I cannot think it is a libel. It is left to you, gentlemen, but that is my opinion.

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Just. Powell. Truly I cannot see, for my part, anything of sedition, or any other crime, fixed upon these reverend fathers, my lords the bishops.

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For, gentlemen, to make it a libel it must be false, it must be malicious, and it must tend to sedition. As to the falsehood, I see nothing that is offered by the king's counsel; nor anything as to the malice. It was presented with all the humility and decency that became the king's subjects to approach their prince with.

Now, gentlemen, the matter of it is before you. You are to consider of it, and it is worth your consideration. They tell his majesty it is not averseness to pay all due obedience to the king, nor want of tenderness to their dissenting fellow-subjects, that made them not perform the command imposed upon them; but they say because they conceive that the thing that was commanded them

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was against the law of the land, therefore they desire his majesty that he would be pleased to forbear to insist upon it, that they should perform that command which they take to be illegal.

Gentlemen, we must consider what they say is illegal in it. They say they apprehend the declaration is illegal because it is founded upon a dispensing power, which the king claims, to dispense with the laws concerning ecclesiastical affairs.

I do not remember, in any case in all our law (and I have taken some pains upon this occasion to look into it), that there is any such power in the king, and the case must turn upon that. In short, if there be no such dispensing power in the king, then that can be no libel which they presented to the king, which says that the declaration, being founded upon such a pretended power, is illegal.

Now, this is a dispensation with a witness. It amounts to an abrogation and utter repeal of all the laws; for I can see no difference, nor know any, in law, between the king's power to dispense with laws ecclesiastical and his power to dispense with any other laws whatsoever. If this be once allowed of, there will need no parliament. All the legislature will be in the king, which is a thing worth considering, and I leave the issue to God and your consciences.

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Just. Allybone. The single question that falls to my share is, to give my sense of this petition, whether it shall be in construction of law a libel in itself or a thing of great innocence.

And I think, in the first place, that no man can take upon him to write against the actual exercise of the government, unless he have leave from the government, but he makes a libel, be what he writes true or false; for if once we come to impeach the government by way of argument, it is the argument that makes it the government or not the government. So that I lay down that, in

the first place, the government ought not to be impeached by argument, nor the exercise of the government shaken by argument; because I can manage a proposition in itself doubtful, with a better pen than another man: this, say I, is a libel.

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Then I lay down this for my next position, that no private man can take upon him to write concerning the government at all; for what has any private man to do with the government if his interest be not stirred or shaken? It is the business of the government to manage matters relating to the government. It is the business of subjects to mind only their own properties and interests. If my interest is not shaken, what have I to do with matters of government? They are not within my sphere. If the government does come to shake my particular interest, the law is open for me, and I may redress myself by law. And when I intrude myself into other men's business that does not concern my particular interest, I am a libeller.

These I have laid down for plain propositions. Now then let us consider further, whether, if I will take upon me to contradict the government, any specious pretence that I shall put upon it shall dress it up in another form, and give it a better denomination? And truly I think it is the worse, because it comes in a better dress; for by that rule every man that could put on a good vizard may be as mischievous as he will to the government at the bottom: so that whether it be in the form of a supplication, or an address, or a petition, if it be what it ought not to be, let us call it by its true name, and give it its right denomination—it is a libel.

Then, gentlemen, consider what this petition is. This is a petition, relating to something that was done and ordered by the government. Whether the reason for the petition be true or false, I will not examine that now, nor will I examine the prerogative of the Crown, but only take notice that this relates to the act of the govern-

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ment. The government here has published such a declaration as this that has been read, relating to matters of government; and shall, or ought anybody to come and impeach that as illegal, which the government has done? Truly, in my opinion, I do not think he should, or ought; for by this rule may every act of the government be shaken, when there is not a parliament *de facto* sitting.

I do agree that every man may petition the government or the king in a matter that relates to his own private interest; but to meddle with a matter that relates to the government, I do not think my lords the bishops had any power more than any others. When the Houses of Lords and Commons are in being, it is a proper way of applying to the king. There is all the openness in the world for those that are members of parliament to make what addresses they please to the government, for the rectifying, altering, regulating, and making of what law they please; but if every private man shall come and interpose his advice, I think there can never be an end of advising the government. I think there was an instance of this in king James's time, when by a solemn resolution it was declared to be a high misdemeanor, and next to treason, to petition the king to put the penal laws in execution.

Just. Powell. Brother, I think you do mistake a little.

Just. Allybone. Brother, I dare rely upon it that I am right: it was so declared by all the judges (*e*).

Sol. Gen. The Puritans presented a petition to that purpose, and in it they said, if it would not be granted, they would come with a great number.

Just. Powell. Ay, there it is.

Just. Allybone. I tell you, Mr. Solicitor, the resolution of the judges is, that such a petition is next door to treason, a very great misdemeanor (*f*).

(*e*) 3 Carte, Hist. Eng. 725; 2
Neal, Hist. Puritans, 4.

(*f*) See 7 Lingard, Hist. Eng. 31.

Just. Powell. They accompanying it with threats of the people's being discontented.

Just. Allynbone. As I remember, the resolution of the judges is, that to frame a petition to the king, to put the penal laws in execution, is next to treason; for, say they, no man ought to intermeddle with matters of government without leave of the government.

Serj. Pemberton. That was a petition against the penal laws.

Just. Allynbone. Then I am quite mistaken indeed, in case it be so.

Mr. Pollexfen. They there threatened (*g*), unless their request were granted, several thousands of the king's subjects would be discontented.

Just. Powell. That is the reason of that judgment, I affirm it.

Just. Allynbone. But then I'll tell you, brother, again, what is said in that case that you hinted at, and put Mr. Solicitor in mind of: for any man to raise a report that the king will or will not permit a toleration, if either of these be disagreeable to the people, whether he may or may not it is against the law; for we are not to measure things from any truth they have in themselves, but from that aspect they have upon the government; for there may be every tittle of a libel true, and yet it may be a libel still: so that I put no great stress upon that objection, that the matter of it is not false; and for sedition, it is that which every libel carries in itself and as every trespass implies *vi et armis*, so every libel against the government carries in it sedition, and all the other epithets that are in the information. This is my opinion as to law in general. I will not debate the prerogatives of the king, nor the privileges of the subject; but as this fact is, I think these venerable bishops did meddle with that which did not belong to them: they took upon them, in a petitionary

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way, to contradict the actual exercise of the government, which I think no particular persons, or singular body, may do.

The jury then retired, were locked up all night, and at ten the next morning came into court, and returned a verdict of Not Guilty.

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This well-known case may be looked upon as a leading authority concerning, I., The dispensing power of the Crown; II., The right of the subject to petition; and III., The nature of a seditious libel.

I. Not only has the Crown, as previously shown (*h*), assumed and ventured to add to existing laws, but has also assumed and ventured to dispense with them. It is difficult to say exactly when this latter encroachment on the liberty of the subject commenced, but, as far as can now be ascertained, the Church of Rome at a very early period affected to dispense with the laws of the land (*i*), and our monarchs were not slow to follow the example. They soon began to issue proclamations, and make grants or decrees "*non obstante* any law to the contrary."

So bold an infringement by the sovereign, of the rights of the subject and laws of the land, was not submitted to without resistance. Matthew Paris (*k*), for instance, in relating a lawsuit between the Bishop of Carlisle and a certain baron, says, that the bishop obtained letters of protection from king Henry III. during his adversary's

(*h*) *Bates's Case*, ante, p. 245; *The Case of Ship Money*, ante, p. 303.

(*i*) Dav. 69, 71. "It is most apparent that *Non obstantes* were first invented and introduced by

Popes between the years of our Lord 1200 and 1250."—Prynne's *Animadversions* on the 4th Inst. 133.

(*k*) Hist. Major, 810. (Ed. 1640.)

absence, and that the suit was afterwards ordered to proceed, in which order was inserted the "detestable clause" "*non obstante* the former order." The historian adds that, referring to this same clause, a justiciary named Roger de Thurkelby (*l*), said, with a deep sigh, "Alas ! alas ! why have we waited for these times ? The Civil Court is now tainted by the example of the Ecclesiastical one ; and by the sulphureous spring the whole river is poisoned."

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The same author also tells us (*m*) that the same king, quoting on one occasion the authority of the Pope for using the clause *non obstante*, was interrupted by the Master of the Hospitallers, who exclaimed, "God forbid that such a graceless and absurd speech (*n*) should proceed from your mouth. As long as you observe the laws of justice you will be a king, but when you infringe them you will cease to be one."

Now, *imprimis*, a distinction must be taken between a dispensation and a pardon (*o*) ; and, again, between a

(*l*) Roger de Thurkelby was appointed one of the Judges of the Common Pleas, A.D. 1241 (Dugdale, Orig. Jurid. 43), and Chief Justice of that Court in 1258 (Dugdale, Chron. Ser. 16). "He is represented as being second to none in his knowledge of the law, and with the higher credit of opposing, though vainly, the iniquitous introduction of the *non obstante* clause in the royal writs : " 2 Foss, Judges of England, 484 ; 1 Rapin, 324.

(*m*) Matthew Paris, Hist. Major, 854.

(*n*) "*Verbum illepidum et absurdum.*"

(*o*) "Where a statute prohibited any action, or enjoined any rule of

conduct, the king, as representing the community, might remit the penalties incurred by the transgression of it. From a step of this nature it was thought no considerable stretch, that he should previously give to individuals a dispensation from the observance of the law ; since the latter seemed to be nothing more than a different mode of exercising a power which he was universally allowed to possess. To pardon a criminal, after he has been guilty, is indeed less dangerous to society than to give a previous indulgence to the commission of crimes ; but in a rude age, this difference is likely to be overlooked. Hence the origin of the dispensing power which was early exercised by

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dispensation and a licence. The effect of a pardon is to relieve from punishment already incurred; the effect of a dispensation is to make lawful beforehand the doing of that which had been previously prohibited by statute. A licence is the permission in the particular instance to do an act forbidden to be done without licence.

Nature of a
dispensa-
tion.

As showing the precise nature of a dispensation, and the mode in which it operated, *Thomas v. Sorrell* (p) may be mentioned. That was a *qui tam* action for a penalty incurred for selling wine by retail in the county of Middlesex without licence. On special verdict the main question for determination was—whether the effect of the stat. 7 Edw. 6, c. 5, which forbade the retailing of wines save under certain restrictions, could be neutralised and set aside by letters patent of king James I., whereby the Company of Vintners in the city of London was incorporated, and authority was given them to sell wine, whether in retail or in gross, within the city and its suburbs, as well as in some other places, “*Non obstante* the statute of Edw. VI.” It was argued for the plaintiff that the letters patent of king James could not dispense with the statute of king Edw. VI., especially as that was a law *pro bono publico*. The learning in regard to the dispensing power of the Crown, as understood in the time of the Tudors and of the Stuarts, will be found elaborately and, in the main, accurately set forth in the above case.

Even in the sixteenth and seventeenth centuries the prerogative of the Crown, as regarded the dispensing with

the sovereign; and which, as long as it was kept within a narrow compass, appears to have excited little atten-

tion.”—2 Millar, Hist. Eng. Gov. 205, 206.

(p) Vaugh. 330. *Ante*, p. 464.

statute law, was admitted to be subject to restriction; a distinction was recognised between that which was *malum prohibitum* merely, and that which was *malum in se* (q). With regard to the latter it was admitted that, inasmuch as the Legislature itself could not legalise it, for instance, could not make lawful murder, stealing, or perjury; so the Crown could not dispense with the observance of a statute declaring either of these acts to be illegal (r). Inasmuch also as the king could not interfere with vested rights—could not confer a favour on one which might tend to the prejudice or detriment of another, so it was laid down that the king could not dispense with a law prohibiting an act as being a public nuisance where a private person had suffered damage from it. We read accordingly that the liability to repair a highway, or to submit to a water-course, or to keep up a bridge (s), cannot be dispensed with, though their non-fulfilment is only punishable by the king, *i.e.*, by indictment, because such a dispensation would take away the action of him who had sustained particular damage by the offence done (t).

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The authorities which concern the dispensing power

(q) Jenk. Cent. 307; Year Bk. 11 Hen. 7, 11, 12.

“*Malum aut est malum in se, aut prohibitum*: that which is against common law is *malum in se*; *malum prohibitum* is such an offence as is prohibited by Act of Parliament, and not by proclamation;” *Case of Proclamations*, 12 Rep. 74, where it was also resolved, that “the king hath no prerogative but that which the law of the land allows him.”

(r) Co. Lit. 120 (a), note 4.

(s) Vaugh. 341; “If a bridge is repairable by a subject, and it falls to decay, and the king pardons him for

repairing it, yet this shall not excuse him, but he shall repair it notwithstanding, because others, viz., all the subjects of the realm, have an interest in it.”—*Nichols v. Nichols*, Plowd. 477, 487.

(t) 12 Rep. 30; by Stat. 22 Vict. c. 32, the Crown is empowered to remit any sum of money which, under any Act, may be imposed as a penalty or forfeiture on a convicted offender, “although such money may be, in whole or in part, payable to some party other than the Crown.” See *Todd v. Robinson*, 53 L. J. Q. B. 251.

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are numerous and conflicting. It seems as if a constant struggle respecting its exercise had been maintained between the royal prerogative and our constitutional freedom, in which sometimes one side prevailed and sometimes the other.

Thus, on the one hand, we find it laid down in a very old case, that "the king by his prerogative royal may grant a licence to an incumbent to hold his benefice *in commendam* with a bishoprick" (*u*); and again that, "the king may grant to a man to be escheater for life, *non obstante* the statute" (*v*).

On the other hand, we read: "It has been held that the king cannot dispense with a statute which disables a man from holding an office, thus he cannot dispense with 31 Eliz. c. 6, against simony (*w*). And a person who had bought the office of cofferer (*x*) was not only held removable at once, but for ever incapable of holding the office, by stat. 5 Edw. 6, c. 16, though he had a *non obstante*; for the person being disabled by the statute could not be enabled by the king" (*y*).

In an earlier case, however, than either of the preceding it had been decided that as, by Act of Parliament, the king might not grant the office of aulnager (*z*) without

(*u*) *Armiger v. Holland*, Cro. El. 542.

(*v*) Plowd. 502, a.

(*w*) *R. v. Bishop of Norwich*, *Coke v. Soker*, Cro. Jac. 385; S. C. Hob. 75.

(*x*) The "cofferer" was a principal officer of the king's household, next under the comptroller. Jacob, L. Dict. *ad verb.*

(*y*) *R. v. Bishop of Norwich*, *supra*.

(*z*) "An Alnager (or Aulnager) is

a public sworn officer of the king's, whose place it is to examine into the assize of all cloths made throughout the land, and to fix seals upon them; and another branch of his office is to collect a subsidy or aulnage duty for the king. He hath his power by 25 Edw. 3, st. 4. c. 1, and several other ancient statutes."—Jacob, Law Dict. tit. Alnager. Alnage duties are now abolished, 11 & 12 Will. 3, c. 20, s. 2, and in Ireland, by 57 Geo. III. c. 109.

a warrant of the Treasury, such grant would be held void, though it had a *non obstante* clause, if that clause were not shown to the Court (a).

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The last-mentioned is not the only case where the judges endeavoured to evade giving a positive decision on the merits of the dispensing power, though they did not hesitate to condemn it indirectly. For instance, the stat. 3 Jac. 1, c. 4, imposes forfeitures for recusancy, and enacts (sect. 11) that the king may refuse the penalty of 20*l.* a-month, and take two-thirds of the lands or leases which be or come to such offenders, till he or they shall conform, in lieu of the 20*l.* monthly; and further enacts, by sect. 12, that the king shall not lease the said two parts to the recusant, or to any other for a recusant's use. The facts in the case referred to (b) being that the Lord Brudnel was a recusant convict, and the Earl of Westmoreland took a lease of the king of two parts of his estate in trust for the recusant, with a *non obstante* of the Act above mentioned, the court held that, because the trust did not appear by any matter of record, they could not take notice of it by matter *dehors*; but said their opinion was that the king in this case could not dispense because he was disabled by the statute to grant.

In the time of Henry VIII., though the prerogative was carried to a very high point, the dispensing power was nevertheless not quite absolute, for it was then decided that "the king cannot dispense with future Acts of Parliament, though he may with things in future whereof he hath an inheritance." In the case here alluded to, the king had granted to one a licence to export bell metal out

(a) *Northcote v. Ward*, 3 Dyer, 303, a.

(b) *Att.-Gen. v. Earl of Westmoreland*, Hardres, 110.

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of the kingdom *non obstantibus* the statutes then made, and thereafter to be made; and after the licence it was enacted by stat. 33 Hen. 8, c. 7, that no person should export bell metal, &c., under a certain penalty. Whether the licence was by this Act revoked? was asked of the judges of the bench; and it seemed to Baldwin, J., and Shelley, J., that it was, for he is a party to the Act; and the king cannot dispense with a new law to be made by Act of Parliament before the Act be made, as he may in things in future of which he hath the inheritance, as if he grant to one to be discharged of all taxes and subsidies to be granted, that is good (c).

At an early period of Queen Elizabeth's reign a sanction was given to the doctrine of a dispensing power in *Quilter's case*, where it was held that whereas the Chief Justice of the Common Pleas could alone, by the prerogative of his office, take the acknowledgment of a fine without a *dedimus potestatem*, a justice of assize could do so by virtue of a patent with a *non obstante* clause (d). In the same reign also occurred the celebrated *Case of Monopolies* (e), in reporting which Lord Coke says: "It is true that forasmuch as an Act of Parliament which generally prohibits a thing upon a penalty, which is popular, or given to the king, may be inconvenient to divers particular persons, in respect of person, place, time, &c., for this reason the law has given power to the king to dispense with particular persons But when the wisdom of the Parliament has made an Act to restrain *pro bono publico* the importation of many foreign manufactures now for a private gain to grant the sole importation of them to one, or divers without any limita-

(c) Dyer, 52 a.

(d) Dyer, 224 b.

(e) *Darcy v. Allain*, 11 Rep. 84 b
—88 a; *ante*, p. 235.

tion, notwithstanding the said Act, is a monopoly against the common law and against the end and scope of the Act itself" (f).

Early in the reign of James I. letters were directed to the Judges to have their resolution concerning the validity of a grant made by Queen Elizabeth under the Great Seal, of the penalty and benefit of a penal statute with power to dispense with the said statute (g), and to make a warrant to the Lord Chancellor or Keeper of the Great Seal, to make as many dispensations, and to whom he pleased, and on great consideration it was resolved that the said grant was utterly against law. The certificate of all the judges of England given upon this occasion concerning such grants of penal laws and statutes, was in these words:

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(f) Lord Coke's report of the above case did not however pass without animadversion, for we find in a pamphlet by the Lord Chancellor Ellesmere the following remarks:—"The Chief Justice doth report it to be resolved that the dispensation or licence from Queen Elizabeth to Darcy to have the sole importation of cards *non obstante* the 3 Edw. 4, c. 4, was against the law, but those that observed the passage of that case, and attended the judgment of the court therein, do know that the judges never gave any such resolution on that point, but passed it by in silence, because they insisted on the body of the patent, whereby the trade of making cards, which was common to all, was by the patent appropriated to Darcy and his assigns, which the judges held to be against law; because it was founded in destruction of a trade whereby many subjects got their living; but in point of dispensation it hath ever been allowed in all

ages, with the difference taken between *malum in se*, and *malum prohibitum*, that the king cannot dispense with the first, but with the other he may; but [as to] that new difference, invented by the reporter, that the king may dispense with *malum prohibitum*, but cannot dispense with a statute made *pro bono publico*, the truth is, the only reason of the judgment was that which is mentioned by the reporter, but *obiter*, which was because Darcy's patent might excuse him upon an information brought upon the statute, but could not give him an action of the case against another."—11 Rep. 88, a. n.

(g) "It appeareth by the preamble of this Act (21 Jac. 1, c. 3) that all grants of the benefit of any penal laws, or of power to dispense with the law, or to compound for the forfeiture, are contrary to the ancient fundamental laws of this realm."—3 Inst. 186.

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—"May it please your Lordships, we have considered among ourselves of such matters as were referred to us and have thereupon with one consent resolved for law and conveniency, as followeth:—1st.

That the prosecution and execution of any penal statute cannot be granted to any, for that the Act being made by the policy and wisdom of the parliament for the general good of the whole realm, and of trust committed to the king as to the head of justice and of the weal public (*h*), the same cannot by law be transferred over to any subject, neither can any penal statute be prosecuted or executed by his Majesty's grant in any other manner or order of proceeding than by the Act itself is provided and prescribed, neither do we find any such grants to any in former ages; and of late years, upon doubt conceived that penal laws might be sought to be granted over, some parliaments have forborne to give forfeitures to the Crown (*i*), and have disposed thereof to the relief of the poor, and other charitable uses, which cannot be granted or employed otherwise. We are also of opinion that it is inconvenient that the forfeitures upon penal laws, or others of like nature should be granted to any, before the same be recovered or vested in his Majesty by due and lawful proceeding; for that in our experience it maketh the more violent and undue proceeding against the subject to the scandal of justice and the offence of many. But if by the industry or diligence of any, there accrueth any benefit to his Majesty, after the recovery,

(*h*) "The Crown, and the Crown alone, is charged generally with the execution and enforcement of penal laws enacted by public statutes for the public good, and is interested, *ut publico*, in all penalties imposed

by such statutes;" per Selborne, L.C., *Bradlaugh v. Clarke*, L. R. 8 App. Cas., at p. 358, *ante*, p. 399.

(*i*) *Vide* Sir T. Smith, *De Rep. Ang.*, lib. 2, cap. 4.

such have been rewarded out of the same at the king's good pleasure " (j).

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In the year following that in which the above certificate was given (A.D. 1605), *The Prince's Case* (k) was decided. —That was a *sci. fa.* to repeal letters patent of Queen Elizabeth granting to certain persons manors appertaining to the Prince of Wales as Duke of Cornwall. It was held that the clause of *non obstante* in the letters patent could not take away the force of the said Acts of Parliament nor prejudice the then Prince of his rights in his said dukedom.

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Towards the end of Charles II.'s reign a case arose where the defendants were convicted of murder in a duel and pleaded their pardon, in which there was a clause *non obstante*, 13 Ric. 2, c. 1, which enacts that if the offence be not specified in the pardon it shall not be allowed. In the pardon *sub judice* the word "murder" was not mentioned but "felonious killing" only, and the court nevertheless held that even if this was contrary to the statute, yet the *non obstante* was a dispensation of it (l).

Perhaps the most celebrated case next to that now annotated, in which the limits of the dispensing power were discussed, was *Godden v. Hales* (m). The question there arose upon the stat. 25 Car. 2, c. 2, "for preventing dangers which might happen from popish recusants," the action being brought to recover from the defendant, an officer in the army, the penalty imposed by that statute on any one holding office or commission under the Crown, who omitted to take the oaths, and make the subscription

(j) 7 Rep. 36.

(k) 8 Rep. 1, 29 b.

(l) *R. v. Coney*, 3 Mod. 37.

(m) 2 Show. 475; S. C. 11 St. Tr. 1166.

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required by the Act. The defendant having pleaded in answer to the statute a dispensation, the issue raised was decided in favour of the prerogative by submissive judges who did not hesitate to declare that the sovereign was absolute (n). In fact the supporters of the dispensing power were almost necessarily driven to this assertion, and we find one of them in a pamphlet published about this time enunciating the following opinion:—"Whenever the king to gratify parliament doth consent in parliament to any law, by which he seems to strip himself of, or depart from any prerogative, or right which in truth is inseparable from him as king; or when the king in parliament, or otherwise, by any declaratory words or speeches, seems to relinquish such right, such consent to such law is no more than an agreement on his part not to use that right ordinarily; but only in extraordinary occasions, when in his princely wisdom he shall find it necessary and for the public good. But this bars him not to use the right again when he sees just cause to do so, nor can any declaratory words spoken by the king, or his assent inserted into any Act of Parliament estop the king in any case of this nature" (o).

Monstrous as the above doctrine may appear, it was scarcely stranger than that laid down in the *Case of Non Obstante* (p), where we read "No Act can bind the king from any prerogative which is sole and inseparable from his person, but that he may dispense with it by a *non*

(n) Macaulay, Hist. Eng. ii. 213.

(o) "Considerations touching the great question of the King's Right in dispensing with the Penal Laws," by Richard Laughton. 1687.

The author probably had some

notion of the well-established doctrine, that the king is not bound by any Act of Parliament, unless he be named therein by special and particular words. As to which see Leg. Max., 6th ed., 68.

(p) 12 Rep. 18.

obstante; as a sovereign power to command any of his subjects to serve him for the public weal, and this royal power cannot be restrained by any Act of Parliament, neither in *thesi* nor in *hypothesi* but that the king by his royal prerogative may dispense with it; for upon commandment of the king, and obedience of the subject doth his government consist."

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At this day, however, we may rather adopt the propositions stated on behalf of the plaintiff in *Godden v. Hales*, that "the king cannot dispense with an Act of Parliament (*q*) that is of public concern because of the interest which every subject hath therein;" and that "wherever an Act of Parliament inflicts a disability the king cannot dispense therein—neither the king's pardon after, nor his dispensation before, can take away the disability" (*r*).

The dispensing power has frequently been exercised by the Crown in matters ecclesiastical (*s*). The right to exercise it was learnedly discussed in *The Case of Eton College* (*t*) (A.D. 1815), where the facts appeared as follows:—In the year 1813 the question arose between the Societies of King's College, Cambridge, and Eton College, whether

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(*q*) Statutes wherein all the subjects of the realm have interest cannot be dispensed with by means of a *non obstante*.—4 Inst. 135; Sir T. Smith, *De Rep. Ang.*, lib. 2, cap. 4.

"If one be bound to the king in a recognizance for to keep the peace against one and others the liege people of the king, in this case the king cannot pardon or release the recognizance."—12 Rep. 30.

(*r*) See *R. v. Bishop of Norwich*, ante, p. 496; *Godden v. Hales*, 11 St. Tr. 1166; Essay by Sir Robert

Atkyns on the Dispensing Power, cited 11 St. Tr. 1200, 1213, 1247; Vindication by Chief Justice Herbert of his Judgment; Id. 1251, 1254, 1255.

(*s*) A noted case was that of Magdalen College, Oxford, on the fellows of which James II. imposed a Roman Catholic President. See *Proceedings against St. Mary Magdalen College in Oxon.*, 12 St. Tr. 1.

(*t*) This case has been separately reported by Mr. P. Williams.

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the fellows of Eton were not acting in contravention of an express clause in their statutes prohibiting them from holding any ecclesiastical preferment with their fellowships, it appearing that the majority of the fellows of Eton were clergymen holding benefices. The provost and fellows of King's College further contended, upon the wording of the same statutes; 1st, that the vacant fellowships of Eton were to be supplied from the body of fellows at King's College; 2ndly, that the fellows of King's were entitled to participate in the patronage of Eton College immediately after the fellows of Eton themselves.

This important case was heard before the Visitor of Eton College (*u*), the Master of the Rolls (*v*) and the Judge of the High Court of Admiralty (*w*) sitting with him as assessors.

The case for the appellants, as already intimated, was that the statutes of the founder of both the above-named Colleges, king Henry VI., prohibited the fellows of Eton from holding conjointly with their fellowships any ecclesiastical preferment.

The respondents justified their conduct upon three grounds:—1st. Under a dispensation granted by Queen Elizabeth (A.D. 1566); and 2ndly, under a general practice from which they argued the existence of some early statute warranting it, lost in the course of time; 3rdly, they contended that the statutes of Henry VI. rightly interpreted did not prohibit the practice which had been impugned.

For our present purpose it will suffice to notice the first only of the grounds above specified; in reference to which, while the counsel for the appellants urged that the dis-

(*u*) The Bishop of Lincoln.

(*v*) Sir W. Grant.

(*w*) Sir W. Scott.

pensation granted by Queen Elizabeth was inoperative, Dr. Lushington on the part of the respondents contended that from a very early time such a dispensing power as that in question had been a legal flower of the prerogative, that it was known to the common law, and that when the sovereign became head of the church he possessed *jure ecclesiastico* that same dispensing power which had formerly belonged to and had been exercised by the pope (x). The learned advocate cited authorities in support of the view thus presented, and argued that the declaration of the lords at the time of the Revolution, "that the dispensing power of the Crown, as it has of late been exercised, is illegal," admitted in general terms the legal existence of such a power; and that the expression "as of late exercised" could by no construction be applied to a dispensation granted more than a hundred years before. The fact, it was further argued, of the power of dispensing with Acts of Parliament having been abolished in the next year by the Bill of Rights, clearly showed that even this extensive power was considered as part of the prerogative, though the violent abuse of it by the Crown had rendered its further continuance intolerable.

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The result of this case was that the Visitor by the advice of his assessors, without giving any reasons for his judgment, pronounced against the appeal and declared that the fellows of Eton College were entitled to the benefit of the dispensation granted by Queen Elizabeth conformably to their antecedent practice.

Upon the whole the current of authority serves to show that the prerogative of dispensing by *non obstante* with Acts of Parliament was, subject to certain restrictions, re-

(x) 1 Hall. Const. Hist., p. 66.

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cognised in former times as vested in the Crown; that it was repeatedly exercised during the sixteenth and seventeenth centuries is certain; that it was often abused is no less certain; and that its misuser eventually cost king James II. his crown is known to all. This asserted branch of the prerogative was annihilated by the Bill of Rights, which declared that "the pretended power of suspending (*y*) of laws or the execution of laws, by regal authority, without consent of Parliament is illegal;" and that "the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal" (*z*).

Since this time no one has presumed to advocate the existence of a dispensing power, under any circumstances whatever, as inherent in the Crown (*a*).

(*y*) 1 Will. and Mar. Sess. 2, c. 2, preamb. 1.

(*z*) *Ib.*, preamb. 2. "The history of these words, 'as exercised of late,' is well known. They were an amendment made by the Lords to the bill to save some old charters and grants with *non obstante*; and to secure against all dispensations whatever with statutes in time to come, there is a clause at the end of the Act, declaring that no dispensation by *non obstante* of or to any statute should be thereafter allowed, except a dispensation to be allowed in such statute. But what was the dispensing power exercised of late by king James? It was only dispensing with penal laws; that is, a remitting or dispensing with penalties inflicted by Act of Parliament in certain cases; and even that sort of dispensation, or exercise of the dispensing power by king James, is con-

demned by the Bill of Rights as illegal."

See a speech against the suspending and dispensing prerogative, made in the House of Lords, A.D. 1766.—16 Parl. Hist. 263.

(*a*) In 1766, in consequence of apprehended famine, the Crown laid an embargo on corn. It was, however, held in Parliament that though the measure was expedient and proper, it was illegal, and that an Act of indemnity was necessary.—16 Parl. Hist. 245, *et seq.*; 2 Campb. Chief Just. 468; 1 Massey, Hist. Eng. 300; *ante*, p. 376, n. (*d*).

In a speech made in the debate on this point in the Lords it was said: "We are, as it were, surprised into a debate on the dispensing power, and what astonishes me still more, we are got, at least some of us, into a vindication and defence of it, a thing I had long thought so odious in its very

II. The right of the subject to petition (*b*) has in the next place to be considered.

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One of the most valuable privileges possessed by the subject is that of petitioning the Crown and parliament. It is referred to by Mr. Justice Holloway in the principal case (*c*) as "the birthright of the subject," and seems to have been exercised from the very earliest times, and to be recognised in Magna Carta (*d*). It is said there are to be found in the Tower, petitions of the

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name, but so settled in the notions of it, and so exploded in theory, as well as practice, that nobody ever thought of it but to hate it, and to thank God it was utterly exterminated out of the pure solar system of the English Government and English liberty."—16 Parl Hist. 251.

(*b*) In treating this subject, petitions addressed to the Crown and to either House of Parliament, are referred to indiscriminately, as the law respecting them is identical. The Tumultuous Petitioning Act treats them both in the same way, and the Bill of Rights is always considered applicable to both. In early times petitions seem to have been generally addressed to the sovereign, probably from the notion that he was more powerful, and therefore more likely to be able to grant what was prayed in them.

In 5 Edw. 1, it was ordered that the petitions should be considered, in the first instance, by the judicial officers to whose department they belonged, and not brought before the king and council, unless relating to matters of weight and importance. Another regulation was established 21 Edw. 1. Receivers were then appointed by the king, and petitions to

the Crown were to be examined and sorted into five bundles—for the Chancery, the Exchequer, the justices, king and council, and such as had before received an answer; and thus were they to be reported (*raportées*) to the king.—Palgrave, Authority of the King's Council, 23, 63; *et vide* Hale, Jurisdiction of the Lords, 75—79; Elsyng on Parliaments, 262, *et seq.* The practice of appointing receivers and triers of petitions is still continued by the Lords at the commencement of each parliament, though the functions of these officials have long since given way to the immediate authority of Parliament. At the present day, the sovereign sometimes receives petitions personally, and sometimes through different officers attached to his court or person; whilst in parliament the practice is for the petitioner to address whichever branch of the legislature he prefers. See further as to the history and practice of parliamentary petitioning, May, Parl. Pract., 9th ed., 606 *et seq.*

(*c*) *Ante*, p. 483.

(*d*) "*Nulli negabimus aut differemus rectum vel justitiam.*"—Magna Carta of John, c. 40; of Hen. 3, c. 29.

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time of Edward I. ; and there seems reason to suppose that before that period persons aggrieved came personally to prefer their complaints before the council of the realm (*e*). These early petitions, however, seem to have been for the redress of private grievances, and the practice of petitioning on political subjects does not appear to have come into vogue till the time of the great rebellion (*f*). Many petitions, most numerous signed, were presented both to the king and to the Long Parliament. That assembly, however, while it thanked those who supported its opinions, nevertheless reprov'd and punished several who were bold enough to present petitions of which it did not approve (*g*) ; and Charles himself did not hesitate to tell petitioners that the matters respecting which they petitioned were no business of theirs (*h*).

Petitions were not looked upon with favour at the time of the Restoration ; and, probably with a vivid recollection of those preferred in the preceding reign, an Act (*i*) was early passed against tumultuous petitioning. Thereby it was enacted that not more than twenty names should be signed to any petition to the king or either House of Parliament, for any alteration of matters established by law in Church or State ; unless the contents thereof were previously approved, in the country by three justices, or the majority of the grand jury at the assizes or quarter sessions, and in London by the Lord Mayor, aldermen, and common council (*k*) ; and that no petition should be

(*e*) May, Parl. Pract. 606, 9th ed. Each peer, as one of the hereditary counsellors of the Crown, is individually privileged to have an audience of her Majesty. May, Parl. Pract. 71, 9th ed.

(*f*) 1 May, Const. Hist. 436.

(*g*) Clarendon, Hist. of the Rebellion, ii. 225, 348. Oxford, Ed., 1826. Comm. Journ. v. 354, 367, 368.

(*h*) Rushworth Coll. v. 459—462.

(*i*) 13 Car. 2, st. 1, c. 5.

(*k*) "This may be one reason (among others) why the corporation

delivered by a company of more than ten persons ; on pain in either case of incurring a penalty not exceeding 100*l.* and three months' imprisonment.

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Notwithstanding this discouragement, some few petitions continued to be presented ; and in December, 1679, in consequence of the dissatisfaction of the nation at the repeated prorogations of parliament, great endeavours were used to get numerous signatures to petitions, praying that parliament might really meet on the day to which it had previously been prorogued (January 26th) (*l*). This coming to the knowledge of the court, the Lord Mayor and aldermen of the city of London were summoned before the Privy Council, and directed to proceed against all persons who either signed these petitions, or went about to collect signatures for them. The Lord Mayor replied that he knew of no law to justify them in so doing, as the people had a right to petition for the redress of grievances. Two days afterwards (on the suggestion of the infamous Jefferies, then Recorder), a royal proclamation (*m*) was issued, forbidding all persons to sign such petitions under pain of punishment.

of London has, since the restoration usually taken the lead in petitions to parliament for the alteration of any established law."—4 Bla. Com. 147.

(*l*) Echard, Hist. Eng. 986. 1 Ralph, Hist. Eng. 490.

(*m*) "Whereas his Majesty hath been informed that divers evil-disposed persons at this time endeavour in several parts of this kingdom, to frame petitions to his Majesty for specious ends and purposes relating to the public, and therefore to collect and procure to the same the hands or subscriptions of multitudes of his Majesty's subjects ; which proceedings

are contrary to the common and known laws of this land ; for that it tends to promote discontents among the people, and to raise sedition and rebellion. His Majesty considering the evil consequences that may happen if such offences should go unpunished ; and lest that any of his good subjects should be inveigled by plausible pretences, or should, through inadvertency or ignorance, be engaged to a breach of the laws, in any of the particulars aforesaid ; his Majesty hath therefore thought fit (by the advice of his privy council) to declare and make the same known, by this

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Notwithstanding this proclamation, various petitions continued to be presented, which gave rise to some counter addresses to the throne, expressing an *abhorrence* (*n*) of seditious persons, pernicious principles, and tumultuous petitioning.

In the tyrannical reign of James II. we do not hear much of petitions, but on the accession of William and Mary this valuable privilege was expressly sanctioned and secured in the Bill of Rights (*o*), which declares "that it is the right of the subjects to petition the king; and all commitments and prosecutions for such petitioning are illegal." Since then no one has ventured to say that petitioning is illegal in itself, though it is comparatively in modern times that very numerous petitions have been sent up as a means of expressing the opinion of the nation on questions of general interest and importance. The House of Commons indeed for a long time showed itself extremely jealous of any semblance of interference with its functions, and was in the habit till quite recently of

his royal proclamation, and doth hereby strictly charge and command all and every his loving subjects, of what rank or degree soever, that they presume not to agitate or promote any such subscriptions, nor in anywise join in any petition of that manner to be presented to his Majesty, upon peril of the utmost rigour of the law, that may be inflicted for the same. And his Majesty doth further command all magistrates, and other officers to whom it shall appertain to take effectual care, that all such offenders against the law be prosecuted, and punished according to their demerits."—1 Ralph, Hist. Eng. 491.

Roger North seems particularly to admire the skill shown in drawing up

this proclamation, saying: "It is obvious enough to any, that knows the course of affairs in England, to discern the art and caution of this draft; therefore it would be superfluous to comment upon it." He nevertheless illustrates his meaning by reference to the wording of the proclamation.—1 Examen, 547.

(*n*) About this time, consequently, the two principal parties in the country were called Petitioners and Abhorers (8 Hume, 126; 1 Ralph, 494), which names were then or soon after changed to Whig and Tory; 1 Cooke, History of Party, 103; 2 Hallam, Const. Hist. 439; Macaulay, Hist. Eng. i. 202.

(*o*) 1 Will. & M. Sess. 2, c. 2.

rejecting any petition, of which it did not happen to approve. For instance in 1772 when a petition was presented to the House, signed by about two hundred and fifty of the clergy and by several members of the professions of law and physic, praying for relief from subscription to the thirty-nine articles, it was rejected (*p*).

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Not only, however, is the right to petition now recognised, but the act of petitioning is free to all (*q*), and parliament will receive any petition respectfully worded (*r*), and complying with the forms of the House, whilst the statute of 13 Car. 2, has nearly become a dead letter, and under ordinary circumstances, no one dreams of enforcing that Act (intended to prevent violent and tumultuous petitioning), or of inquiring when a petition is presented, whether its conditions have been complied with. However, on the trial of Lord George Gordon, Lord Mansfield expressly decided that the said statute had not been repealed (*s*), and on the presentation of the great Chartist petition in 1848, the Act was cited (*t*) when the large body of petitioners were prohibited from marching to present it to the House.

(*p*) Ann. Reg. 1772 ; 86.*

(*q*) Though in 1810 there was some ill feeling excited in the corporation of London by the king's refusing to receive a petition from them, reflecting on the mode in which the Peninsular war was conducted, yet it was never suggested on either side, that there was, or could be any doubt as to the right to petition, and the only point in dispute was, one of form, viz., whether the petition should be presented directly, or through the medium of a Secretary of State.—Ann. Reg. 1810, 243.

(*r*) In 1840 a petition from one Stockdale was rejected on the ground that it contained an intentional and deliberate insult to the House.—95 Com. Journ. 193. And for other instances of petitions rejected or ordered to be withdrawn on similar grounds, see May, Parl. Prac. 612 *et seq.* 9th ed.

(*s*) Dougl. 592 ; 21 St. Tr. 646 ; Bowyer, Eng. Const. 584 ; Stephen, Hist. Crim. Law, vol. ii., 291 ; see also the Stat. 57 Geo. 3, c. 19, s. 23.

(*t*) *Post.* p. 515.

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There is one point on which both Houses of Parliament are very particular, and properly so, namely in insisting that any forgery or fraud in the preparation of petitions, or in the signatures attached to them, or the being privy to, or cognizant of such forgery or fraud be punished as a breach of privilege (*u*). Such frauds seem to have been almost coeval with political petitioning itself, for we find Lord Clarendon complaining of the fraudulent means by which signatures were obtained to the petitions presented to parliament A.D. 1640, touching Church government and the Episcopacy (*x*).

In 1774 a committee of the House of Commons appointed to examine a petition presented from the town of Barnstable, ascertained that the names of several persons had been affixed to such petition without their knowledge or consent (*y*), and in consequence almost directly afterwards it was resolved by the House (*z*) on June 2nd "that it is highly unwarrantable, and a breach of the privilege of this House, for any person to set the name of any other person to any petition to be presented to this House." And more recently there have been instances of persons being committed or otherwise punished for this offence (*a*).

Before leaving this subject, it may be right to notice the three most celebrated petitions presented to parliament during the preceding and present centuries, viz., the Kentish Petition in 1701, Lord George Gordon's petition,

(*u*) May, Parl. Prac. 611, 9th ed.

(*x*) Clarendon Hist. Rebellion, i. 357, Oxford ed. 1826.

(*y*) 34 Comm. Journ. 799.

(*z*) 34 Comm. Journ. 800.

(*a*) 80 Comm. Journ. 445; 82 *ib.*

561, 582; 98 *ib.* 523, 528; 106 *ib.*

193, 289; 120 Comm. Journ. 157,

336; 134 *ib.* 175, 180; 82 Lords'

Journ. 367, 478; 94 Lord's Journ.

360, 321, 386. See the Chartist Peti-

tion, *post*, p. 516.

or the petition of the Protestant Association, in 1780, and that of the Chartists in 1848.

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In the year 1701 there was a serious misunderstanding between the Lords and Commons, caused by the impeachment of the peers concerned in the Partition treaty, and party spirit was running high throughout the country. In the county of Kent especially, considerable disapprobation was expressed of the conduct of the Commons (*b*), and on April 29th at the Quarter Sessions a petition to that House was drawn up by the chairman at the request of the grand jury, and signed by twenty-three justices and very many other persons (*c*). It professed to set forth the dangerous state of the kingdom, and saying that the safety of the country depended on the wisdom of its representatives, besought them to have regard to the voice of the people, to turn their loyal addresses into bills of supply, and so enable the king to assist his allies.

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to petition.
The Kentish
Petition,
1701.

The petition was presented on May 8th by five of the justices in the names of the rest. They were called into the House and asked if they owned it; on answering that they did, they were ordered to withdraw, and the petition was read, whereupon it was resolved "that the said petition is scandalous, insolent, and seditious, tending to destroy the constitution of parliaments, and to subvert the established government of this realm" (*e*), and these five gentlemen were ordered into the custody of the sergent-at-arms (*f*).

During the discussion which followed the presenting of this petition, some members of the House endeavoured to persuade the five who had presented the petition, to

(*b*) 2 Ralph, 946; 3 Rapin (Tindal's Continuation), 471.

(*c*) 11 Somers, Tracts, 244.

(*e*) 13 Comm. Journ. 518; 5 Parl. Hist. 1251.

(*f*) 2 Ralph, Hist. Eng. 947.

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avoid ulterior consequences by apologizing and making submission to the House. This, however, they refused to do, answering, "We are humbly of opinion that it is our right to petition this honourable House, according to the statute of 13 Car. 2. As to the matter of our petition, we declare that we intend nothing offensive to this honourable House" (*g*).

The commitment of the five Kentish justices caused great dissatisfaction throughout the country, and a very violent address was thereupon presented to the House, in a letter (*h*), strongly remonstrating with them on their conduct. Nevertheless the five presenters of the Kentish petition were not released till the prorogation of parliament in the month of June ensuing.

Lord George
Gordon's
Petition,
1780.

The next celebrated petition worthy of being noticed is that of the Protestant Association, presented by Lord George Gordon, A.D. 1780. The year before, an Act (*i*) had been passed mitigating some of the penalties imposed on the Roman Catholics by previous legislation. This Act gave great offence to many, and a large body of persons, with Lord George Gordon at their head, formed themselves into a society called the Protestant Association (*k*), and by them a petition was drawn up, which his lordship promised to present to the House of Commons, on condition that at least twenty thousand persons should

(*g*) 11 Somers, Tracts, 248; 2 Ralph, 947.

(*h*) 5 Parl. Hist. 1251; 3 Rapin (Tind. Con.), 476; 3 Kennet, 809.

(*i*) 18 Geo. 3, c. 60.

(*k*) The Gentleman's Magazine for A.D. 1780, says, (p. 265), that the Protestant Association was at first composed of most worthy Protestants, who only sought by legal means to

obtain security against any abuse of the law passed in favour of the Catholics; and that after Lord George Gordon had put himself at the head of it, and begun drawing together large crowds of people, the society was deserted by those temperate and conscientious men, who at first composed the majority of the Association.

accompany him (*l*). With this view he convened a meeting of the Association in St. George's Fields on June 2nd, which was attended by an immense rabble; the crowd, being divided into three parts, accompanied his lordship to the House, where he presented the petition, and demanded that it should be taken into instant consideration. Though the mob attacked several members, and were guilty of the greatest intimidation, the House had the spirit to reject almost unanimously (*m*) the motion. The mob continued to besiege the House till driven away by the military; when they went to other parts of the metropolis, and for some days continued to commit outrages. The following year Lord George Gordon was tried for high treason (*n*), in having levied war against his Majesty. It was contended by his counsel at the trial that there was nothing illegal in his presenting the petition with so large a band of followers, inasmuch as the statute of Charles II. against tumultuous petitioning had been repealed by the Bill of Rights; but this proposition, as already stated (*o*), was negatived by Lord Mansfield (*p*). The prisoner was

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(*l*) Ann. Reg. 1780, 190, 254; 2 Massey, Hist. 456; 3 Belsham, Hist. Geo. 3, 31; 3 Lecky, Hist. Eng. 510.

(*m*) 37 Comm. Journ. 901.

(*n*) Ann. Reg. 1781, 217; 21 St. Tr. 485; Dougl. 590.

(*o*) *Ante*, p. 511.

(*p*) Lord Mansfield in his charge to the Grand Jury, directed them that "to petition for the passing or repeal of any Act is the undoubted inherent birthright of every British subject, but under the name and colour of petitioning to assume command, and to dictate to the legislature, is the annihilation of all order and government. Fatal experience had shown

the mischief of tumultuous petitioning, in the course of that contest, in the reign of Charles I., which ended in the overthrow of the monarchy, and the destruction of the constitution; and one of the first laws after the restoration of legal government, was a statute passed in the 13th year of Charles II. (cap. 5), enacting, that no petition to the king, or either House of Parliament, for alteration of matters established by law in church or state (unless the matter thereof be approved by three justices or the grand jury of the county), shall be signed by more than twenty names or delivered by more than ten persons.

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The Chartist
Petition,
1848.

acquitted, though many persons were convicted and punished who had participated in the riots (*q*).

The next petition calling for remark is that of the Chartists, A.D. 1848, in favour of the five points of the Charter, viz., Annual Parliaments, Universal Suffrage, Equal Electoral Districts, No Property Qualification (*r*), and Payment of Members.

About the time of the great political disturbances (*s*) throughout Europe, the Chartists, with Feargus O'Connor (Member for Nottingham) at their head, convened a monster meeting to be held on Kennington Common on April 10th, to be followed by a procession to Westminster, to present the petition. Notices were posted by the police, citing the Act of Charles II. (*t*), that not more than ten persons might go to present a petition, and warning the populace that they would not be allowed to form the procession to Westminster. The events of that day are well known (*u*), and it would be foreign to the purpose of this work to relate them. By the precautions taken the affair passed off peaceably, and the great petition, said to contain upwards of five millions of signatures (*x*), was presented to the House.

"In opposition to this law, the petition in question was signed and delivered by many thousands, and in defiance of principles more ancient and more important than any regulations upon the subject of petitioning, the desire of that petition was to be effected by the terror of the multitude that accompanied it through the streets, classed, arranged, and distinguished as directed by the advertisements." 21 St. Tr. 487.

(*q*) Ann. Reg. 1780, 285.

(*r*) The property qualification for

members of parliament was abolished by stat. 21 & 22 Vict. c. 26.

(*s*) Ann. Reg. 1848, 124.

(*t*) Ann. Reg. 1848, Chron. 51.

(*u*) See Molesworth, Hist. Eng. from the year 1830, p. 354.

(*x*) Very exaggerated statements, however, were promulgated as to the numbers of those who had signed this petition. It contained, moreover, many signatures which, on examination, were found to be fictitious. 103 Comm. Journ. 442; Ann. Reg. 1848, 126, Chron. 53, 54.

III. A libel as defined by Mr. Starkie is, "any writing, picture, or other sign, which immediately tends to injure the character of an individual, or to occasion mischief to the public" (y).

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Nature of a
seditious
libel

Sedition is understood to comprise within its meaning all offences against the king and the government which are not capital and do not amount to the crime of treason (z); and all contemptuous, indecent, or malicious observations upon the person of the king or his government, whether by writing or speaking, or by tokens, calculated to lessen him in the esteem of his subjects, to weaken his government, or to raise jealousies of him among the people, will fall under the notion of sedition (a).

From the above definitions may tolerably well be inferred what is the offence of seditious libel; it is however susceptible of an elastic meaning, and accordingly in past times the Crown when strong enough has been in the habit of punishing almost every obnoxious criticism on the acts of government as constituting a seditious libel (b).

(y) 1 Stark. on Libel, 9. For other definitions, see Starkie on Libel and Slander, by Folkard, p. 3.

(z) Tomlins, Law Dict. tit. "Sedition;" Stephen, Dig. Crim. Law, Arts. 91—94.

(a) *Ib.* In *Lord Cromwell's Case*, 4 Rep. 13, sedition is defined to be *seorsum itio* when a man takes a course of his own. 1 Rushworth, Coll. App. 19.

(b) 2 May, Const. Hist. 99; 3 Hallam, Const. Hist. 167. Dr. Tutchin, in the reign of Queen Anne, was convicted for uttering a seditious libel, in which, among other things, he complained of the mismanagement of

the navy, and expressed an opinion that some of our officials were bribed by France. Lord Holt, in summing up, told the jury, "To say that corrupt officers are appointed to administer affairs is certainly a reflection on the government. If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary to all governments that the people should have a good opinion of it. And nothing can be worse to any government than to endeavour to procure animosities, as to the management of it; this has always been

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BISHOPS'
CASE.

Nature of a
seditious
libel.

Formerly it was scarcely safe to express political opinions anywhere out of parliament, and even there at one time our monarchs were in the habit of repressing liberty of speech (*c*), though that right was early claimed, and has since been successfully maintained (*d*).

Out of parliament, however, it was, during long periods of our history, unsafe for any one to venture to assert that the system of government was imperfect (*e*). A statement of opinions, for the utterance of which persons have been severely punished, might now astonish the unlearned (*f*). Thus, a respectable attorney was indicted for having said in a coffee-house, in discussing the French revolution, "I am for equality. I can see no reason why any man should not be on a footing with another; it is every man's birthright;" and on being asked what he meant by equality, replied, "I mean no king; the constitution of this country is a bad one." He was found

looked upon as a crime, and no government can be safe without it be punished."—*Tutchin's Case*, 14 St. Tr. 1103, 1127.

(*c*) See *Hazey's Case*, Rot. Parl. iii. 339; *Young's Case*, *Id.* v. 337; and *Strode's Case*, Parl. Hist. 85.

(*d*) The Commons ever enjoyed the privilege of freedom of speech, though it was never desired by any of the ancient speakers till 33 Hen. 8.—Elsynge on Parliaments, 175, 176. May, Parl. Prac., 9th ed., 120.

(*e*) Binns was tried, but acquitted, for saying that universal suffrage and annual parliaments were most conducive to the happiness of the people, that they should obtain it by every peaceable means in their power, but if it became necessary to use force he hoped there was not one who would

not be ready to shed the last drop of his blood in the cause.—*Binns' Case*, 26 St. Tr. 598.

In the year 1783, Sir William Jones, afterwards one of the Indian judges, wrote a dialogue between a scholar and a farmer, as a vehicle for explaining to common capacities the great principles of society and government, and for showing the defects in the representation of the people in the British Parliament. His brother-in-law, the Dean of St. Asaph, had this printed, and was tried for publishing a seditious libel; he was found guilty, though judgment was afterwards arrested.—*Dean of St. Asaph's Case*, 21 St. Tr. 847.

(*f*) See Odgers on Libel and Slander, pp. 410—422.

guilty, sentenced to six months' imprisonment, to stand in the pillory, and to be struck off the roll (*g*).

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Such expressions as the following have also been held to be seditious: "I highly approve of the revolution in France, and I do not doubt but that it has opened the eyes of the people of England" (*h*), and "His Majesty was placed upon the throne upon condition of keeping certain laws and rules, and if he does not observe them, he has no more right to the throne than the Stuarts had" (*i*). It would indeed be wearying to recite the comparatively innocent speeches that were stigmatized as seditious in the reign of George III.; perhaps the climax was the case of a loyal yeoman of Kent, who, when intoxicated, having applied abusive language to the king, was for this indiscretion indicted at the sessions and sentenced to a year's imprisonment. A complaint having been made to the Lord Chancellor Loughborough, touching the severity of this sentence, his lordship refused to interfere, upon the ground that "to save the country from revolution, the authority of all tribunals high and low must be upheld" (*k*).

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libel.

Since the time referred to, when terror excited by the French revolution drove the government nearly mad, common sense, together with the determination of juries (*l*) not to convict on ridiculous charges, has caused

(*g*) *Frost's Case*, 22 St. Tr. 471.

(*h*) *R. v. Winterbotham*, 22 St. Tr. 823.

(*i*) *Id.*

(*k*) 6 Camp. Lives of the Chancellors, 265.

(*l*) The judges were at one time (though not without remonstrance) in the habit of directing juries that the only point for them to consider in a

trial for libel, was whether the defendant published the letter or paper in question, and whether the inuendoes imputing a particular meaning to particular words were correct, but that whether the publication was libellous or innocent, was a pure question of law, on which the opinion of the Court might be taken, but with which the jury had nothing to

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a more rational construction of language charged as libellous to prevail. Words are not now considered seditious, because they merely criticize the government, ordinary decency of expression being all that is requisite to ensure immunity (m); but there is a clear distinction between such criticism and the publication of words or writings intended directly to incite others to the commission of crimes, in which case the public safety demands the prosecution and punishment of the offender (n).

do. This doctrine was for a long time both assailed and maintained, till the dispute was set at rest by Fox's Libel Act (32 Geo. 3, c. 60), which *declares* and enacts that the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue upon the indictment or information, and shall not be required or directed by the Court or judge to find the defendant guilty, merely on proof of the publication of the paper charged to be a libel, and of the sense ascribed to the same in the indictment or information. Provided that on every such trial the Court or judge shall, according to their discretion, give their opinion and direction to the jury on the matter in issue in like manner as in other criminal cases.—*Vide* 2 May, Const.

Hist. 109—117; Forsyth, Trial by Jury, 268—282; 16 Parl. Hist. 1321; Letters of Junius, No. 41; Lord John Russell, Essay on English Government, 391; 5 Camp. Lives of the Chancellors, 295; 2 Camp. Chief Justices, 478—493, 540; 22 St. Tr. 294 *et seq.*

(m) "There is no sedition in censuring the servants of the Crown, or in just criticism on the administration of the law, or in seeking redress of grievances, or in the fair discussion of all party questions," *per* Fitzgerald, J.; *Reg. v. Sullivan*, 11 Cox's C. C. 50.

(n) See *R. v. Neale*, 9 C. & P. 431; *R. v. Collins*, 9 C. & P. 450; *Reg. v. Pigott*, 11 Cox's C. C. 47; *Reg. v. Sullivan*, 11 Cox's C. C. 50; *Reg. v. Most*, L. R. 7 Q. B. D. 244.

PART II.

RELATION OF THE SUBJECT TO THE EXECUTIVE.

HAVING spoken of the relation of the subject to the sovereign, let us now proceed to discuss his relation to the executive department, which puts in motion and aids in working the complicated machinery organised by the legislative body. The executive consists mainly of public officers or servants, divisible into three classes: the political; the military and naval; the judicial. And our aim will be to determine in what position the subject stands relatively to these officials—what are his rights against—what his liabilities to them—what are the privileges and immunities, if any, which the State extends to them—what considerations of public policy influence it in dealing with them. The enquiry indicated naturally succeeds that which has been instituted as to the relation of the subject to the sovereign. It naturally precedes that which must presently be instituted respecting the relation of the subject to parliament.

At the head of the executive, according to our constitution, stands the sovereign. He it is who in theory nominates and dismisses all officials—such as we shall be now concerned with—*sc.* a Secretary of State—the governor of a colony or dependency—an officer, military or naval—or one entrusted with judicial functions:—any limitation of this high prerogative being imposed by parliament and assented to by the sovereign, as a component member of the legislature—for example, in

the case of the judges of the Supreme Court of Judicature, whose commissions are made out *quamdiu se bene gesserint*, and who are removable only by the Crown on address by both Houses of Parliament (*a*) ; this restriction of the constitutional powers of the Crown having been needed to ensure the independence of the Bench, and to render abortive such sinister tampering with it as had been prevalent under the Stuart dynasty.

When determining the liability of any public functionary for damage caused by his act to a fellow-subject, a seeming conflict between principles will be noticeable, and an anxiety in the breast of our law on the one hand to assist the suitor, who perchance complains of wrong—on the other to protect the officer, who in inflicting an apparent injury may but have acted in conformity with his strict duty.

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(6 Geo. 3, A.D. 1765.)

SEIZURE OF THE PERSON.

A general warrant issued by a Secretary of State to search for and seize the author (not named) of a seditious libel is illegal (c).

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Declaration. This was an action of trespass brought by Dryden Leach, against three king's messengers, John Money, James Watson, and Robert Blackmore, for breaking and entering the plaintiff's house, and imprisoning him,

(*a*) 12 & 13 Will. 3, c. 2, s. 3 ;
1 Geo. 3, c. 23, and 38 & 39 Vict.
c. 77, s. 5 ; as to the Judicial Com-
mittee of the Privy Council, see 34 &
35 Vict. c. 91, s. 1 ; as to the Lords
of Appeal in Ordinary, see 39 & 40
Vict. c. 59, s. 6.

(*b*) S. C. 3 Burr. 1692, 1742 :
1 W. Bla. 555.

(*c*) Although the opinion of the
Court was expressed in conformity
with the proposition above stated, the
case, it will be found (*post*, p. 543),
was decided on another ground.

without any lawful or probable cause ; to the plaintiff's damage of 2,000*l*.

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Pleas.

The defendants pleaded two pleas. 1st, Not Guilty, on which issue was joined. 2nd, a special justification, as to the breaking and entering of the plaintiff's dwelling-house, and continuing therein for six hours, and making the assault upon him, and seizing, and imprisoning him, and detaining him in prison for four days : as to all which, they say,—That before the supposed trespass, viz., on 19th April, 1763, the king made a speech from the throne, &c., in which speech was contained the following declaration, &c. That on the 23rd April, 1763, a certain seditious and scandalous libel or composition, intitled, "The North Briton, No. 45," was unlawfully and seditiously composed, printed, and published, concerning the king and his said speech ; in which libel were contained, &c. That the Earl of Halifax was then one of the Privy Council, and one of his Majesty's principal Secretaries of State ; and that information was given to him of the said publication of the aforesaid libel ; and the said libel was then shewn and produced to the said earl ; and he thereupon in due manner issued his warrant in writing under his hand and seal, directed to Nathan Carrington and these three defendants, who were then four of his Majesty's messengers in ordinary : by which warrant, the said earl did in his Majesty's name authorize and require them, taking a constable to their assistance, to make strict and diligent search for the said authors, printers, and publishers of the aforesaid seditious libel, and them or any of them having found, to apprehend and seize, together with their papers, and to bring in safe custody before the said earl, to be examined concerning the premises, and to be further dealt with according to law : in the due execution whereof all mayors, sheriffs, justices of the peace, constables, and all others his said Majesty's messengers, officers civil and military, and loving subjects whom it might concern, were to be aiding and assisting

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to them the said Carrington, Money, Watson, and Blackmore, as there should be occasion. The defendants further say, that for forty-four weeks and upwards before the issuing of the said warrant, certain weekly compositions, intituled, "The North Briton," and respectively numbered in a progressive order, had been printed and published in every week; and that the said seditious libel, intituled, "The North Briton, No. 45, Saturday, April the 23rd, 1763," was one of the said weekly compositions. That the plaintiff followed and exercised the art and business of a printer: and did in fact print and cause to be printed one of the said weekly compositions, intituled, "The North Briton;" to wit, the North Briton, No. 26, and that after the issuing of the aforesaid warrant, and before the committing of the said supposed trespass, to wit, on the 27th of April, 1763, information was given to the defendants, "That the said Leach and his servants were the printers of the aforesaid seditious libel, intituled, The North Briton, No. 45, Saturday, April the 23rd, 1763." Wherefore the defendants, being his Majesty's messengers in ordinary as aforesaid, took to their assistance a certain constable, to wit, one Freeman, who was then a constable of the parish of St. Margaret, Westminster, in the county of Middlesex, to aid them in the execution of the warrant; and, together with the said constable, entered into the dwelling-house of the said Leach, in which the said Leach carried on his business of a printer, the door thereof being then open, to search for the printers of the said seditious libel, in order to carry them before the said Earl of Halifax, to be examined concerning the same: and thereupon the defendants did find, within the same house, a newly-printed copy of one of the said weekly compositions, intituled, "The North Briton," and also an unfinished copy of part of another of the said compositions then also newly printed, and which said newly-printed copies were part of a new edition, which the said Leach and his ser-

vants were then and there re-printing, of the aforesaid weekly compositions. Whereupon the defendants, together with the constable above named, did gently lay their hands on the said Leach, and seized and took him into their custody, in order to bring him before the said Earl of Halifax, to be examined concerning the said seditious libel; and in so searching for the printers of the seditious libel, and seizing and taking the said Leach as aforesaid, did necessarily continue in the said house of the said Leach for the space of six hours, part of the time in the declaration mentioned. And because the said Earl of Halifax was, during all the said space of four days, part of the five days in the declaration mentioned, employed in other business belonging to his said office, so that the said Leach could not during the said four days be brought before the said earl for the purpose aforesaid, they the defendants, together with the constable aforesaid, did keep and detain the said Leach in their custody for the said four days in order to carry him before the said Earl for the purpose aforesaid, They further say, that at the end of the aforesaid four days, and not before, upon the examination of the said Leach and certain other persons it appeared to the said Earl that the said Leach did not print the said seditious libel intituled, "The North Briton, No. 45, Saturday, April the 23rd, 1763:" and thereupon, the defendants, by the command of the said Earl, did then and there release the said Leach out of their custody, and discharged him from that imprisonment. Which are the same breaking and entering, &c., and staying therein for the space of six hours, &c., imprisoning, &c. And this the defendants are ready to verify. Wherefore they pray judgment, if the said Leach ought to have or maintain his aforesaid action thereof against them, &c.

The plaintiff replied *de injuriâ* (d) to the said plea in

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(d) By this replication the plaintiff traversed all the material facts alleged in justification.

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bar, as to the breaking and entering the dwelling-house, and staying there six hours, and also as to the making of the assault upon him, and imprisoning of him, and keeping him in prison four days. And upon this issue was joined.

The cause came on to be tried before Pratt, C.J., on the 10th of December, 1763, at Guildhall: when the jury found a verdict for the plaintiff upon both issues; and gave him damages £400, besides his costs, &c. On the 16th of June, 1764, judgment was signed for the plaintiff, for £400 damages, and £51 16s. 8d. costs.

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Error.

At the trial, a bill of exceptions was tendered on behalf of the defendants, and a writ of error was afterwards brought by them, which alleged as follows:—

Evidence
for plaintiff.

That upon the trial, the counsel for the plaintiff Leach, in order to prove the defendants guilty of the trespass, gave in evidence, that on the 29th of April, 1763, the defendants entered the plaintiff's dwelling-house, searched it, and continued in it four hours; seized and took Leach into their custody against his will and consent; and kept him in their custody against his will for four days: which was all the trespass, assault, and imprisonment committed by the defendants, or any of them. Whereupon their counsel, under the general issue above pleaded, gave in evidence and proved, that before the committing of the trespass, the king made a speech from the throne, &c., containing the several expressions stated in the second plea of the defendants; and afterwards and before the supposed trespass a paper intitled, "The North Briton, No. 45," &c., was printed and published; and that the same contained the several matters set forth in their said second plea (c): and it was proved that the Earl of Halifax was, all that time, one of his Majesty's principal Secretaries of State, and one of the Privy Council; and that information was given to him of the said publication

of the above-mentioned paper; and the same was then shown to him; and thereupon the said earl issued his warrant in writing, under his hand and seal, directed to Carrington and the defendants, who were then four of his Majesty's messengers in ordinary. And their counsel then produced and gave in evidence the warrant aforesaid, which was in the words and figures following, that is to say, "George Montague Dunk, Earl of Halifax, &c., one of the lords of his Majesty's most honourable Privy Council, &c., and principal Secretary of State, &c.—These are in his Majesty's name to authorise and require you, taking a constable to your assistance, to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, intituled, 'The North Briton, No. 45, Saturday, April 23, 1763. Printed for G. Kearsly in Ludgate Street, London;' and them or any of them having found, to apprehend and seize, together with their papers, and to bring in safe custody before me, to be examined concerning the premises, and further dealt with according to law. In the due execution whereof all mayors, sheriffs, justices of the peace, constables, and all others, his Majesty's officers civil and military, and loving subjects whom it may concern, are to be aiding and assisting to you, as there shall be occasion. And for your so doing, this shall be your warrant. Given at St. James's, the 26th day of April, 1763, in the third year of his Majesty's reign. Dunk Halifax. To Nathan Carrington, John Money, James Watson, and Robert Blackmore, four of his Majesty's messengers in ordinary." And it was further proved on behalf of the said defendants, that several of the like warrants had been granted, at different times, from the time of the Revolution to the present time, by the principal Secretaries of State, and had been executed by the messengers in ordinary for the time being; and that the paper in the said warrant described was the said paper so printed and published as aforesaid; and that the warrant aforesaid, before the com-

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mitting of the supposed trespass, was delivered to the defendants, to be executed; and, that they were then three of his Majesty's messengers in ordinary, and still are so. It was also proved, on their behalf, that for forty weeks and upwards next before the issuing of the aforesaid warrant, certain weekly compositions, intituled, "The North Briton," had been printed and published on Saturday in every week; and that the aforesaid paper, intituled "The North Briton, No. 45, Saturday, April 23, 1763," described in the said warrant, being one of the said weekly compositions, was printed and published before the issuing of the said warrant, to wit, on the 23rd day of April, 1763; and that after the issuing of the above-mentioned warrant, and before the committing of the said supposed trespass, the defendants were informed by Nathan Carrington, one other of the messengers in the said warrant named, and one of the persons to whom the said warrant was directed, that from the information he had received, he was of opinion that the said Dryden Leach, who then and long before was, and still is a printer in the city of London, was the printer of "The North Briton;" for that he, Carrington, had been informed that one Mr. Wilkes, a person supposed to be the author of the said weekly compositions, had been seen frequently to go into Leach's house; and that an old printer, whose name he the said Carrington did not mention to the defendants, had told him that Leach was the printer of the said compositions: and that thereupon the defendants took to their assistance a constable, and with the constable entered Leach's dwelling-house (the door being open) to search for the said Leach and his books and papers; and to bring him, together with his books and papers, in safe custody, before the said Earl, to be examined concerning the premises, and to be further dealt with according to law; and upon that occasion did search the said house, and necessarily continued therein for the space of four hours. It was further given in evidence and proved on

the part of the defendants, that upon that search, the defendants did find Leach in the said house, and did also find a newly-printed sheet, containing a copy of one of the said weekly compositions, intituled, "The North Briton, No. 1," and part of a copy of another of the said weekly compositions, intituled, "The North Briton, No. 2," which sheet was printed by the said Leach. And it was further proved, that the said Leach did also print one of the said weekly compositions, intituled, "The North Briton, No. 26." And the defendants, with the assistance of the constable, did seize and take into their custody the said Leach, in order to bring him in safe custody before the said Earl, to be examined concerning the premises; and on that occasion did detain him in their custody for the space of four days; at the end of which time, it appearing by the examinations of divers persons then taken, touching the author, printer, and publisher of the said paper, that the said Leach was not the author, printer, or publisher thereof, the defendants, by the command of the said Earl, released and discharged him from that imprisonment: but the said Leach was never carried before or examined by the said Earl. And that the entering the house of the said Leach, and searching the same, and taking and detaining him in the manner and on the occasion stated, were the whole of the trespass, assault and imprisonment, committed by the said defendants, or any of them. But it was proved on the part of the said Leach, that he was not the author, printer, or publisher of the said paper, intituled, "The North Briton, No. 45," in the said warrant mentioned, nor of any other numbers of the said weekly compositions, except as before stated. Whereupon the counsel for the defendants insisted before the Chief Justice, that the several matters so produced and given in evidence on their part were sufficient, and ought to be admitted and allowed as decisive evidence to entitle them to the benefit of the statute of 24 Geo. II., intituled, "An

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Act for rendering justices of the peace more safe in the execution of their office, and for indemnifying constables and others acting in obedience to their warrants" (f); and that therefore the said Leach ought to be barred of his action, and the defendants acquitted thereof. Thereupon the defendants, by their counsel, did pray of the Chief Justice to admit and allow the matters and proof so produced and given in evidence for the defendants as aforesaid, to be conclusive evidence to entitle the defendants to the benefit of the statute aforesaid, and to bar the said Leach of his action aforesaid. But the counsel for the plaintiff insisted that the matters aforesaid so produced and proved on the part of the defendants were not sufficient, nor ought to be allowed to entitle the defendants to the benefit of the statute aforesaid, or to bar the said Leach of his action; and that neither the defendants, or any of them, nor the said Earl, were or was within the words or meaning of the stat. 7 Jac. 1, c. 5, intituled, &c.; nor of the stat. 21 Jac. 1, c. 12, being an Act to enlarge and make perpetual the preceding statute; nor of the said stat. 24 Geo. 2, c. 44; nor entitled to the benefit of any of those statutes. And the counsel for the said Leach further insisted, that the seizure and imprisonment of the said Leach were not made and done in obedience to the said warrant; nor had the defendants, or any of them, in that behalf, any authority thereby. And the Chief Justice did declare and deliver his opinion to the jury aforesaid, "that the several matters so produced, and proved on the part of the defendants were not, upon the whole case, sufficient to bar the said Leach of his aforesaid action against them;" and, with that opinion, left the same to the jury. Whereupon the counsel for the defendants did except to the aforesaid opinion of the Chief Justice; and insisted on the said several matters and

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proofs as an absolute bar to the aforesaid action, by virtue of the last-mentioned statute.

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The case was first argued by De Grey, S.G., for the plaintiffs in error; and by Dunning for the defendant in error.

Argument
in Error.

Mr. De Grey argued as under:—

I. The defendants had a right to plead the general issue, and to give the special matter in evidence, under 7 Jac. 1, c. 5. Or, in other words, Lord Halifax, the Secretary of State, was a justice of the peace within the intention of that Act.

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for plaintiffs
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II. The evidence was sufficient to entitle the defendants to a verdict. Which will take in both the validity of the warrant itself, and the manner of executing it.

III. They were also entitled to a verdict within the meaning of 24 Geo. 2, c. 44, the plaintiff not having observed the terms required by that statute.

1. Before the stat. 7 Jac. 1, c. 5, a matter of special justification could not be given in evidence by a justice of the peace, upon the general issue pleaded by him.

The question is—Who were meant in that Act of Parliament, by justices of the peace?

Some persons were so, from ancient times, by office; some are so by special commission; some, by corporation-charters; some by tenure; some by prescription.

In the time of Edward III., other persons were authorised to act within particular districts.

But the great officers of state had the jurisdiction, as incident to their offices. So had, in some degree, coroners and other inferior officers.

The Secretary of State must have had it as incident to an office, so ancient as to be coeval with the Crown itself.

In cases of treason, and of felony, the courts of law recognise his authority; and there is equal reason for it, in cases of misdemeanor; which affect government, and disturb the public peace.

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A seditious libel is an offence against government and the public peace; and effectually undermines government.

A Secretary of State is a sentinel for the public peace: it is his duty to prevent the violation of it, and to bring offenders to justice; and it is necessary that he should be invested with this power, in order to enable him to execute his duty.

The case of *R. v. Kendal* (g) has settled this point, as to treason: for it was there held, that "Secretaries of State might commit for suspicion of treason, as conservators of the peace did at common law; and that it was incident to the office, as it is to the office of justices of peace, who do it *ratione officii*." And the commitment to a messenger was there held good.

In *Reg. v. Derby* (h), for publishing a scandalous and seditious libel called "The Observer," the two points above mentioned were admitted by Mr. Lechmere, who was counsel for the defendant. He agreed the power of a Secretary of State to commit for treason or felony; and that a messenger was a proper officer. And in that case the Court held the warrant good and legal.

In *R. v. Earbury* (i), the defendant had been arrested and committed by warrant of a Secretary of State; and his papers seized, which he applied to have restored; Lord Hardwicke held, that they could not be restored, in a summary way, on motion. The warrant there was "to search for the papers, and to bring the author before the Secretary of State" (k).

2. If the special matter may be given in evidence, then the question will be, whether this matter given in

(g) 1 Salk. 347; S. C. 5 Mod. 78; 12 *Id.* 82; Comberb. 343; 12 St. Tr. 1299; Skin. 596; Holt, 144.

(h) Fost. 140.

(i) Fortesc. 37, S. C. (*nom. R. v. Earbury*), 8 Mod. 177.

(k) Counsel then proceeded to argue that the Secretary of State was a conservator of the peace (see *post*), and so entitled to protection under various statutes. See 19 St. Tr. 1017.

evidence would, if it had been pleaded, amount to a justification.

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It is objected that the warrant is not legal; and that it was ill executed.

Argument
for plaintiffs
in error.

As to the warrant itself—No such action has ever been brought upon these warrants, by persons apprehended by virtue of them: or, at least, there is none upon record.

It is said, that this warrant is too extensive in the description of the person: and that it has been abused.

Answer.—The power is not illegal: and the abuse of it is no objection to the warrant itself. - Such warrants are agreeable to long practice and usage.

Whatever the present determination may be, in point of law, it will be in the breast of the legislature to set it right.

The power of justices of peace to commit before indictment, stands supported only by practice and usage. Holt, C. J., says, "Formerly, none could be taken up for a misdemeanor, till indictment found: but now the practice all over England is otherwise" (*l*). And *per* Hale (*m*), "that practice is become a law."

The greatest judges have bailed persons taken up upon these warrants; and they have not been objected to, by either courts, or counsel of the greatest eminence: whereas, if they were not legal, the persons apprehended upon them ought to have been discharged (*n*). The Court will not make orders upon illegal warrants: consequently, they saw no objection to them. Even the greatest friends to the Revolution have not objected to these warrants. From whence it must be inferred, that no objection lies against them.

On 6th July, 1641, in the case of Sir John Elliott (*o*), the House of Commons resolved, that it was a breach of privilege: but they did not vote it illegal.

(*l*) *Anon.* 6 Mod. 178.

(*n*) 1 Hale, P. C. 578.

(*m*) P. C. vol. ii. p. 108.

(*o*) 3 St. Tr. 293.

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In *Miss Blandy's Case* (*p*), her bureau was broken open: and her papers seized; and given in evidence.

Indecent prints or books may be seized by a magistrate: and they often have been so.

Evidence taken from felons or other criminals may be produced against them; though a criminal shall not be compelled to produce such evidence against himself.

It is said, that this warrant is illegal, because it is general, to take up the author, printer, or publisher. But it is legal to issue and execute a warrant against a person unknown, but only described. Indeed the magistrate issues it, and the officer must execute it at his peril. And though the warrant includes seizing the papers, yet that part of it has not been executed: and the bare insertion of it shall not affect the officer who executed the other part of the warrant (*q*).

A justice of the peace having jurisdiction, may grant a proper warrant on probable cause: and ministerial officers (constables, &c.) are not to be affected by the illegality of the warrant, in other parts of it. This warrant was executed honestly, and upon a probable cause.

3. The plaintiff's action is sufficiently barred by 24 Geo. 2, c. 44, for want of observing the terms required by it. He neither proved notice, as sect. 3 requires, nor made the demand required by sect. 6.

The defendants have acted in obedience to the warrant of a magistrate who is a justice of the peace within the meaning of this Act; and by his order, and in his aid.

The only doubt is, whether the action is brought for anything done in obedience to the warrant, or not.

The defendants have obeyed it, to the best of their power.

However, as they have acted under colour of the war-

(*p*) 18 St. Tr. 1117.

(*q*) Counsel then proceeded to argue that upon the facts, above set

out, there was probable cause for taking up the plaintiff.

rant, meaning to obey it, they are not answerable, although they may have erred in execution of it. They are protected by this Act, if they have acted *bonâ fide*; even though the warrant and the execution be illegal. They are not to judge of arduous points of law; the statute means to protect them from it.

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The previous step to bringing this action was not taken, viz., the demanding a perusal and copy of the warrant, and showing a refusal of it.

If there was a fault, or negligence, or mistake in this proceeding, the fault was in the magistrate: there was none in the officer who executed it. And the requisite steps have not been taken, in order to maintain the suit. Therefore the plaintiff is barred of this action.

Mr. Dunning, contra—for Leach, the plaintiff below.

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for defend-
ant in
error.

The first question is, whether this be a case within 24 Geo. 2, c. 44. Which will involve the question, whether it be within the Acts 7 Jac. 1, c. 5, or 21 Jac. 1, c. 12.

All these statutes, being *in pari materiâ*, must receive the same construction; and they are all inapplicable to the present case.

He then made three sub-divisions of his first question: viz. :—

1st. Whether Lord Halifax, being Secretary of State, is a conservator or justice of peace, within the true intent and meaning of the stat. 24 Geo. 2, c. 44.

2ndly. Whether the defendants are constables, head-boroughs, or officers, &c., within the intent and meaning of that Act.

3rdly. Whether this action is brought and properly pursued, within the true intent and meaning of it; and for a matter done in obedience to the warrant.

1st.—Lord Halifax is not a justice of the peace within 24 Geo. 2, c. 44. He is not so by commission: he is not so, as incident to his office, either of Secretary of State, or of Privy Counsellor.

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But it has been said, he is a conservator of the peace, and therefore within the meaning of the Act.

I deny the principle and also the conclusion. I admit the case of *R. v. Kendal* (r), though the reasons of it do not appear: that a Secretary of State has a power to commit for high treason.

I deny that a Secretary of State is a conservator of the peace. He has only a power of committing for high treason, as conservators of the peace had in other cases, and *R. v. Kendal* carries it no further.

All the Crown writers are silent on the subject of a Secretary of State having this jurisdiction. None of them even hint that a Secretary of State is a conservator of the peace. Staundford, Fitz-Herbert (s), Lambard, &c., say no such thing.

Lambard (t) gives the list of those officers who are conservators of the peace: but there is no mention therein of Secretaries of State. Serjeant Hawkins (u) copies the same list, without adding Secretaries of State.

There is no proof or pretence that the conservatorship of the peace is incident to their office: nor is there any usage to support such a notion. Their claim of a power to grant such warrants as the present one, is not pretended to be older than the Revolution.

If they were justices of the peace, or conservators of the peace, they would be bound to execute the powers given to justices, or residing in constables: and they would be subject to the control of this Court.

The offices are different in creation, constitution, and execution.

The very language of the warrant shows that the Secretary of State did not consider himself as a justice, conservator, or constable.

(r) *Ante*, p. 532.

(s) Fitzh. Justice of the Peace, 6 b.

(t) Lib. i. c. 3.

(u) P. C. Bk. ii. c. 8, s. 2.

This statute is not to be extended beyond the letter of it: it is not within the maxims or reasons of extension of Acts of Parliament.

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So much for the noble lord.

2ndly.—As to the messengers—They do not fall within the words or meaning of the stat. 7 Jac. 1, c. 5, which is confined to officers who are persons known in our law, and bound to execute the warrant of a justice of the peace.

The king's messengers in ordinary are persons unknown to our law, and mere volunteers in executing warrants of justices.

The words, "other officers," &c. used in the statute mean borsholders, &c., officers of the same sort as constables and tithingmen; not king's messengers. These persons cannot be considered as aiding and assisting the constables. The warrant and the fact are quite the reverse: the constables are directed to assist them.

This warrant is not under the hand and seal of a justice of peace. Therefore the Act does not protect the defendants.

3rdly.—Nor is the act done in obedience to this warrant. The warrant was to "apprehend the author, printer, or publisher;" but they have executed it upon a person who was not the author, printer, or publisher. Consequently, as they have not acted under it, they cannot be protected by it.

The obedience to the warrant is the condition of the protection which the Act gives to the officer. Therefore, the condition failing, the protection does not take place.

Here is no probable cause, nor any reason for justifying the officer under a probable cause. It is not like the cases of apprehending traitors or felons. Here is only information from one of their own body, that the author of the paper had been seen going into Leach's house; and that Leach was the printer of the composition in general; not of this particular paper.

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But though neither was this hearsay information in itself true, nor would the consequence follow, if it had been true, yet they thereupon arrest and imprison an innocent man. Therefore these men themselves are to answer for doing this: not the person who issued the warrant. The warrant did not command nor authorise them to do what they have done. It is necessary for them to show an acting in obedience to the warrant: otherwise they are not within the protection of the Act. [In proof of which he cited two cases; one by the name of *Lawson* or *Dawson* v. *Clerk* (r); and the other a *Norwich* case, where a bailiff had executed the warrant out of the proper jurisdiction.]

Besides, the party apprehended was not carried before Lord Halifax, or dealt with according to law. Surely this was the act of the officer; not of the person who signed the warrant. And no reason is given, stated, pretended, or even existed, why this matter was so transacted. Therefore there was no probable cause or reason whereupon to ground a justification of this their conduct.

So that, even allowing the Secretary of State to be a justice of the peace, and the officers to be constables; yet the action lies against the plaintiffs in error, who have acted in this unjustifiable manner.

It appears therefore, that even if they had a defence upon the merits, they have not properly pleaded it. However, in fact they had no defence upon the merits: the plaintiff *Leach* was neither author, printer, nor publisher of the paper; nor at all within the description of the warrant.

But the warrant itself is illegal. It is against the author, printer, and publisher of the paper, generally, without naming or describing them; and not founded on any charge upon oath; it is also to seize his papers; that is, all his papers.

No justice of the peace has power to issue such a warrant. Therefore Lord Halifax could not do it as a justice of the peace. Nor is there any pretence of usage to support such a claim of doing it as Secretary of State further back than the Revolution.

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It lies upon the defendants below to prove their claim, and to show their authority.

The practice of a particular magistrate cannot control the law. *Communis error* is not, in this case, sufficient to make law. It is the duty, and it is therefore, doubtless, the inclination of the Court to stop the mischief as soon as it is complained of to them.

If "author, printer, and publisher," without naming any particular person, be sufficient in such a warrant as this is, it would be equally so, to issue a warrant generally, "to take up the robber or murderer of such a one." This is no description of the person; but only of the offence: it is making the officer to be judge of the matter, in the place of the person who issues the warrant. Such a power would be extremely mischievous, and might be productive of great oppression.

To ransack private studies in order to search for evidence, and even without a previous charge on oath, is contrary to natural justice, as well as to the liberty of the subject: and it is as useless as it is cruel, in the case of libels; because it is the publication only that makes the crime of a libel.

To search a man's private papers *ad libitum*, and even without accusation, is an infringement of the natural rights of mankind. And this is a warrant to seize all a man's papers, without any particular relation even to the crime they would suppose him chargeable with (*w*).

No case of this sort has ever undergone judicial discussion and determination. And as the Court does not

(*w*) See *Wilkes v. Wood*, *post*, p. 544; *Entick v. Carrington*, *post*, p. 555.

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interpose in cases not objected to, no arguments can be drawn from such as passed *sub silentio*.

All the writers upon the Crown law say, that there must be an accusation; that the person to be apprehended must be named; and that the officer is not to be left to arrest whom he thinks fit (*x*).

Here, it is left to the officer, to take up any person whom he himself suspects.

Lord Chief Justice Scroggs was impeached for issuing such warrants as this is (*y*).

Therefore he prayed judgment for the defendant in error.

Mr. De Grey, S. G., having been heard in reply on behalf of the plaintiffs in error,

Lord Mansfield, C. J., observed:—

A bill of exceptions supposes the evidence true; and questions the competency or propriety of it.

Whether there was a probable cause or ground of suspicion, was a matter for the jury to determine: that is not now before the Court. So—whether the defendants detained the plaintiff an unreasonable time.

But if it had been found to have been a reasonable time, yet it would be no justification to the defendants; because it is stated, that this man was neither author, printer, nor publisher: and if he was not, then they have taken up a man who was not the subject of the warrant.

The three material questions are—1st. Whether a Secretary of State, acting as a conservator of the peace by the common law, is to be construed within the statutes of James I. and of the last king.

The protection of the officers, if they have acted in obedience to the warrant, is consequential, in case a Secretary of State is within these statutes. As to the arrest being made in obedience to the warrant, or only under colour

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(*x*) Hale P. C. 580, 586; Hawk.
P. C. Bk. ii. c. 13, s. 10.

(*y*) 8 St. Tr. 195, 197.

of it and without authority from it—this question depends upon the construction of the warrant; whether it must not be construed to mean such persons as are under a violent suspicion of being guilty of the charge; (for they cannot be conclusively considered as guilty, till after trial and conviction.) The warrant itself imports only suspicion; for, it says,—“to be brought before me, and examined, and dealt with according to law,” and this suspicion must eventually depend upon future trial. Therefore, the warrant does not seem to me to mean conclusive guilt, but only violent suspicion. If the person apprehended should be tried and acquitted, it would show that he was not guilty, yet there might be sufficient cause of suspicion.

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Mr. Dunning says, very rightly, that to bring a person within this 24 Geo. II., the act must be done in obedience to the warrant.

The last point is, whether this general warrant be good.

One part of it may be laid out of the case: for, as to what relates to the seizing of papers, that part of it was never executed; and therefore it is out of the case.

It is not material to determine whether the warrant be good or bad; except in the event of the case being within 7 Jac. I., but not within 24 Geo. II.

At present—as to the validity of the warrant, upon the single objection of the uncertainty of the person, being neither named nor described—the common law, in many cases, gives authority to arrest without warrant; more especially, where taken in the very act: and there are many cases where particular Acts of Parliament have given authority to apprehend under general warrants, as in the case of writs of assistance, or warrants to take up loose, idle, and disorderly people. But here, it is not contended, that the common law gave the officer authority to apprehend; nor that there is any Act of Parliament which warrants this case.

Therefore it must stand upon principles of common law.

It is not fit that the receiving or judging of the informa-

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tion should be left to the discretion of the officer. The magistrate ought to judge, and should give certain directions to the officer. This is so upon reason and convenience.

Then as to authorities—Hale and all others hold such an uncertain warrant void (z), and there is no case or book to the contrary. It is said, that the usage has been so; and that many such warrants have been issued, since the Revolution, down to this time.

But a usage, to grow into law, ought to be a general usage, *communiter usitata et approbata*; and which, after a long continuance, it would be mischievous to overturn.

This is only the usage of a particular office, and contrary to the usage of all other justices and conservators of the peace.

There is the less reason for regarding this usage, because the form of the warrant probably took its rise from a positive statute, and the former precedents were inadvertently followed after that law was expired.

Opinion of
the other
judges.

Mr. Justice Wilmot declared that he had no doubt, nor ever had, upon these warrants; he thought them illegal and void.

Neither had the two other judges, *Mr. Justice Yates*, and *Mr. Justice Aston*, any doubt of the illegality of them: for no degree of antiquity can give sanction to a usage bad in itself. And they esteemed this usage to be so. They were clear and unanimous in opinion that this warrant was illegal and bad.

The Case standing over for further argument on Friday the 8th of November, 1765:

Mr. Yorke, Att. Gen., on behalf of the plaintiffs in error, began to enter into his argument; but when he came to mention the two cases cited by *Mr. Dunning*, both of which were determined before Lord Mansfield, upon the 24 Geo. 2, c. 44, one of them at Norwich summer assizes,

(z) *Ante*, p. 533.

1761; (where damages were given); the other of them (a), on a warrant under the Vagrant Act, 17 Geo. II., (where his lordship held, that the defendant ought to show that the officer had acted in obedience to the warrant, and he did so;) he seemed to intimate that this objection of their not having done so in the present case, was too great a difficulty for him to encounter; and therefore rested the matter where it was, without proceeding any further in his argument.

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Lord Mansfield, C. J., remembered both these cases, and said he still continued of the same opinion.

Where the justice cannot be liable, the officer is not within the protection of the Act. The case in Middlesex concludes exactly to the present case. For, here the warrant is to take up the author, printer, or publisher; but they took up a person who was neither author, printer, nor publisher; so that case was a warrant to take up a disorderly woman, and the defendant took up a woman who was not so (b).

And he held the same opinion now, he said, as he did before, in the case at Norwich.

This makes an end of the case; for this is a previous question, and the foundation of the defence fails.

The consequence is, that the judgment must be affirmed.

The other judges assenting, the judgment was accordingly affirmed (c).

(a) *Dawson v. Clerk*, ante, p. 538.

(b) See Hawk. P. C. (ed. by Leach) Bk. 2, c. 13, s. 31.

(c) "Thus this case went off, without any judicial decision on any of the chief points which were raised in it. The only point professed to be regularly adjudged was, that the warrant in question had not been pursued. Whether a secretary of state is a conservator of the peace *ex officio*, and as such within the equity of the statutes

in favour of justices of the peace; whether he has power to commit for any offence under high treason; whether a single privy counsellor has a right to commit in any case; whether a warrant for the seizure of papers could not be justified in the case of a seditious libel; and whether a general warrant, neither naming the offender, nor otherwise describing him, except by relation to the offence committed, could be maintained at common law;

WILKES v. WOOD, 19 St. Tr. 1153 (d).

(3 Geo. 3, A.D. 1763.)

SEIZURE OF PAPERS.

A general warrant issued by a Secretary of State to search for and seize the papers of the author (not named) of a seditious libel is illegal (c).

This was an action of trespass, for entering the plaintiff's house, breaking his locks, and seizing his papers, &c.

Plaintiff's
case

Mr. Gardiner, in opening the case, stated that on the 30th of April last, Mr. Wood, with several of the king's messengers, and a constable, entered Mr. Wilkes's house; that Mr. Wood was aiding and assisting the messengers, and gave directions concerning breaking open Mr. Wilkes's locks, and seizing his papers, &c., for which Mr. Wilkes laid his damages at 5000l.

Serjeant Glyn then enlarged on the circumstances of the case, and remarked that the case extended far beyond Mr. Wilkes personally, that it touched the liberty of every subject in this country. In vain has our house been declared, by the law, our asylum and defence, if it is capable of being entered, upon any frivolous or no pretence at all, by a secretary of state. Mr. Wilkes, unconvicted of

all these important questions were left unadjudged. However, enough was said by the Court on the last of them to evince, that all the four judges thought general warrants to seize the person universally illegal, except where the granting of them was specially authorised by Act of Parliament; and from the attorney-general's readiness in yielding another point to avoid a decision of that concerning the legality of general warrants, it may be conjectured, that he despaired of being able to support them."—Note by Mr. Hargrave, 19 St. Tr. 1028.

(d) S. C., Loft, 1.

(c) The warrant directed the messengers (taking a constable to their assistance) "to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper entitled 'The North Briton,' No. 45, &c., and these or any of them having found, to apprehend and seize together with their papers."—See *Wilkes's Case*, 19 St. Tr. 981. Under the above warrant Mr. Wilkes was arrested and his papers were seized.

any offence, has undergone the punishment. That, of all offences that of a seizure of papers was the least capable of reparation; that, for other offences, an acknowledgment might make amends; but that for the promulgation of our most private concerns, affairs of the most secret personal nature, no reparation whatsoever could be made. That the law never admits of a general search-warrant. That in France, or Spain, even in the Inquisition itself, they never delegate an indefinite power to search, and that no magistrate is capable of delegating any such power. That some papers, quite innocent in themselves, might, by the slightest alteration, be converted to criminal action. Mr. Wilkes, as a member of parliament, demanded the more caution to be used, with regard to the seizure of his papers, as it might have been naturally supposed, that one of the legislative body might have papers of a national concern, not proper to be exposed to every eye. When we consider the persons concerned in this affair, it ceases to be an outrage to Mr. Wilkes personally, it is an outrage to the constitution itself. That Mr. Wood had talked highly of the power of a secretary of state; but he hoped, by the verdict, he would be brought to think more meanly of it. That if the warrants were once found to be legal, it would fling our liberties into a very unequal balance. That the constitution of our country had been so fatally wounded, that it called aloud for the redress of a jury of Englishmen. That their resentment against such proceedings was to be expressed by large and exemplary damages; that trifling damages would put no stop at all to such proceedings: which would plainly appear, when they considered the persons concerned in the present prosecution, persons, who by their duty and office should have been the protectors of the constitution, instead of the violaters of it.

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Mr. Eyre, Recorder of London, observed that the present cause chiefly turned upon the question, whether a secretary of state has power to force persons' houses, break open their locks, seize their papers, &c. upon bare suspicion of a

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libel, by a general warrant, without name of the person charged. Nothing can be more unjust in itself, than that the proof of a man's guilt shall be extracted from his own bosom. No legal authority, in the present case, to justify the action. No precedents, no legal determinations, not an Act of Parliament itself is sufficient to warrant any proceeding contrary to the spirit of the constitution.

Secretary Williamson, in Charles II.'s time, for backing an illegal warrant, was sent to the Tower by the House of Commons (*f*). The jury, he observed, had no such power to commit; he knew it well; but, for his part, he wished they had, as he was persuaded they would exercise it, in the present case, as it ought to be.

On the famous certificate in Queen Elizabeth's time (*g*), how far a man might be detained by a warrant of a privy counsellor, the answer of the judges, even in those days, confined it to high treason only, and the power to arrest to be deriyed from the personal command of the king, or a privy councillor. He then congratulated the jury that they had now in their power the present cause, which had been by so much art and chicanery so long postponed. Seventy years had now elapsed since the Revolution, without any occasion to inquire into this power of the secretary of state, and he made no doubt but the jury would effectually prevent the question from ever being revived again. He therefore recommended them to embrace this opportunity (lest another should not offer in haste) of instructing those great officers in their duty, and that they (the jury) should now erect a great sea mark, by which our state pilots might avoid, for the future, those rocks upon which they now lay shipwrecked.

The principal witness for the plaintiff was *Matthew Brown*, butler to Mr. Wilkes. He stated that on the 30th of April last, about nine o'clock in the morning, Watson, Blackmore, Money, and Mann, king's mes-

(*f*) Cobbett, Parl. Hist. vol. 4, 1033.

(*g*) *Ante*, p. 199.

sengers, and Chisholm, a constable, came to Mr. Wilkes's house. That about noon Mr. Wood (the defendant) and Mr. Stanhope came; that Mr. Wood asked Mr. Watson, "Have you locked up all the rooms where Mr. Wilkes's papers are?" He answered, "Yes; I have got the key of the study." That Mr. Wood and Mr. Stanhope then went into the parlour. That Mr. Wood staid that time about half an hour; that when he went away he gave orders to the messengers, that no one should come in or go out till he returned, but bade them lock up all the doors. That he came back again in about an hour. That in the mean time several of Mr. Wilkes's friends came and were denied admittance by the constable; that Watson, the messenger, upon being called upon by these gentlemen to produce his orders for refusing them admittance, said he had only a verbal order from Mr. Wood. That the messengers, however, did at last permit the gentlemen to come in. That Mr. Wood then called for a candle, which was brought him, and he and Mr. Stanhope went up stairs, with Money and Blackmore, the messengers, who appeared to take their orders from Mr. Wood and Mr. Stanhope. That they rummaged all the papers together they could find, in and about the room; that they (the messengers) fetched a sack, and filled it with papers. That Blackmore went down stairs, and fetched a smith to open the locks. That Mann, a messenger, then came, and would whisper Mr. Wood, who bade him speak out; he said he brought orders from Lord Halifax to seize all manuscripts. That the smith then came, and, by the direction of Blackmore, the messenger, opened four locks of the lower drawers of a bureau; that they took out all the papers in those drawers, and a pocket-book of Mr. Wilkes's, and put them all into the sack together, and sealed up the sack. That witness was present during all this time; that the messengers were obedient, and paid an entire regard to the directions of Mr. Wood and Mr. Stanhope. That

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Mr. Wood, upon the whole, might be near two hours and a half in Mr. Wilkes's house. That no kind of inventory was made of the papers which were put into the sack.

Defendant's
case.

The foregoing evidence having been generally confirmed by other witnesses, the *Solicitor-General* addressed the jury for the defence, which he divided into two parts; 1st, he maintained the plea of not guilty; but if the jury should be of opinion that it would not stand good, and that the evidence he should bring would not be capable of setting aside the evidence already produced in court on the other side, he then, 2ndly, relied on the special justification. He was at a loss, he said, to understand what Mr. Wilkes meant by bringing an action against Mr. Wood, as he was neither the issuer of the warrant, nor the executioner of it. If the constitution had been in such an egregious manner attacked, why not bring the Secretaries of state themselves into court? Why should Mr. Wilkes commence separate actions against each person? Is Mr. Wilkes, at any event, entitled to tenfold damages? This was the first time he ever knew a private action represented as the cause of all the people of England. If the constitution has, in any instance, been violated, the crown must be the prosecutor, as it is in all criminal cases. The constitution does not consist in any one particular part of the law; the whole law is the constitution of the country, and a breach in one part of the law is as much a violation of the constitution as of another. Though so much has been said on the other side, with regard to the injury that might result from the promulgation of secrets, no proof had been brought of anything being promulgated that was not proper to be so. He then went upon the argument touching the warrant, and observed that these warrants had been issued as far back as the courts of justice could lead them. That the late Act of George II. (*h*) for taking up vagrants allowed

(*h*) *Vide* 17 Geo. 2, c. 5, s. 6.

a general search-warrant, and he never knew it was esteemed an infringement of our constitution. That these warrants had existed before, at, and since the Revolution, and had been till this case unimpeached; that if so contradictory to the constitution of this country, they could never have remained to this time.

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case.

He then observed upon the evidence which had been given by the plaintiff, remarking that the question of liberty had nothing to do with the present cause, which only respected the seizure of papers. That the messengers went bunglingly about their business; Mr. Wood was only sent to see they did their duty.

He then went on to make remarks on the "North Briton," No. 45. If Mr. Wilkes should be proved to be the author of that paper, which he was confident he should be able to prove, to the full satisfaction of the court and jury; so far from thinking him worthy of exemplary damages, he was certain they would view him in his true and native colours, as a most vile and wicked incendiary, and a sower of dissension amongst his Majesty's subjects. He then observed that the freedom of this country consists, that there is no man so high, that he is out of the reach of the law, nor any man so low, that he is beneath the protection of it. That the warrant was legal in itself; that the authority of a secretary of state was sufficiently established. That damages should always be reckoned according to the injury received; a jury that acted on any other principle certainly forswore themselves.

Lord Halifax then came into court, and, being sworn, said, that he did receive information concerning No. 45. That he did issue warrants in consequence of such information. That he did desire Mr. Weston, his secretary, to go to Mr. Wilkes's, and see that the messengers did their duty; that Mr. Weston declined, beseeching his lordship to excuse him on account of his ill state of health; that he then did desire Mr. Wood to go, who

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defendant.

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—
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defendant.

accordingly went. That he had reason to believe that Mr. Wilkes was the author of No. 45. That he had information previous to the apprehending of Mr. Wilkes. That this information tended to prove Mr. Wilkes the author of No. 45.

Upon the Lord Chief Justice expressing a desire to be informed by his lordship concerning the nature of the information said to be received at his office, and about which his lordship appeared rather shy, the Solicitor-General produced an affidavit of Walter Balf, a printer in the Old Bailey, which was read. It had in general a tendency to prove Wilkes the author and Balf the printer of No. 45.

Upon Lord Halifax being cross-examined, he said that Mr. Weston is his own secretary, and that Mr. Wood was Lord Egremont's secretary. That the warrant for the apprehension of Mr. Wilkes was made out on the 26th of April last, and the information he now fixes to have been received on the 29th of April, and the arresting Wilkes's person on the 30th day of April.

[The king's speech at the close of the last session of parliament, and the North Briton, No. 45, were read.]

Oral evidence was then given to connect Mr. Wilkes generally with the publication of the "North Briton." This was objected to as not tending directly to show that he was the author of No. 45; it was however allowed by the Lord Chief Justice "to be a good corroborating chain," but his lordship observed that if the defendant's counsel "failed in the last link the whole would fall to the ground." Evidence was afterwards adduced tending specifically to establish that Wilkes was the author of No. 45.

The counsel for the defendant then went into the legality of the warrant, and many precedents of the same kind of warrants were produced in court, to prove such warrants to be according to the constant uninterrupted course of the secretary's office from the Revolution.

[The warrants from Lord Halifax, for apprehending the authors, printers, and publishers of the "North Briton," No. 45, were likewise read.]

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?
WOOD.
Evidence for
defendant.

Lovel Stanhope, Esq., then stated that he came to Mr. Wilkes's house immediately after he was carried away to Lord Halifax's; that he went with Mr. Wood, and stayed there half-an-hour; that he was there but once, and stayed till the papers were sealed up: that he never went out of the study; that Mr. Wood was in the study but part of the time, and did nothing at all but observe what passed; that he (Mr. Wood), gave no orders to break locks by any kind of means, nor gave the messengers any orders or directions at all, but only bade them do their duty, and use civility. That Mr. Wood was not in the room when the smith was sent for, nor gave any orders for that purpose, as Mr. Stanhope observed; that Mr. Wood was not present when the locks were opened. But that it was Blackmore, the messenger, who broke open the locks. That Mr. Wood went to Mr. Wilkes' merely at the instance of Lord Halifax, in order to enforce a due and proper obedience to and execution of the warrant, and to prevent the messengers from committing any blunders. That a debate arising, whether a table with a locked drawer should be removed entire or be opened, Mr. Mann was sent to Lord Halifax for directions, and brought word that the drawer must be opened.

Upon being cross-examined, the witness said that the messengers were to take manuscript papers only, and not meddle with improper matters, such as printed books, papers, &c. That he did think it incumbent upon him to see that all the proper papers should be removed.

Serjeant Glynn in his reply observed, that what he had to remark he should divide under two heads, 1st, as to the defence which had been set up of not guilty; and, 2ndly, make observations on the special justification that had been pleaded.

The evidence proved, uncontroverted, that Mr. Wood

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Reply.

was the prime actor in the whole affair. Was it possible to suppose that a man of Mr. Wood's character and known abilities should be sent only with a message that any menial servant could have delivered as well; and that he should have nothing else to do with the affair. He then went upon the point of justification, and observed that as to Mr. Wilkes being the author of No. 45, they had totally failed in any kind of proof whatsoever. He then observed as to the warrant, that it was destitute of those things necessary to make it legal: that a previous information was always necessary. That the defendants had nothing to entitle them to a verdict. That the case was a wound given to the constitution, and demanded damages accordingly: that Mr. Wilkes's papers had undergone the inspection of very improper persons to examine his private concerns, and called for an increase of damages on that score. The evidence brought of precedents of these warrants only shows how easily things may creep into our constitution, subversive of its very foundation. He closed with telling the jury he made no doubt but they would find a verdict for the plaintiff, with large and exemplary damages.

Summing
up of Pratt,
C.J.

The *Lord Chief Justice Pratt* summed up the evidence, and observed that this was an action of trespass, to which the defendant had pleaded first Not Guilty, and then a special justification.

He then went through the particulars relating to the justification, the king's speech, the libel No. 45; information given, that such a libel was published; Lord Halifax granting a warrant; messengers entering Mr. Wilkes's house; Mr. Wood directed to go thither only with a message, and remaining altogether inactive in the affair.

If the jury should be of opinion that every step was properly taken as represented in the justification, and should esteem it fully proved, they must find a verdict for the defendant. But if on the other hand they should view

Mr. Wood as a party in the affair, they must find a verdict for the plaintiff, with damages. This was a general direction his lordship gave the jury, and he then went into the particulars of the evidence.

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His lordship then went upon the warrant, which he declared was a point of the greatest consequence he had ever met with in his whole practice. The defendants claimed a right, under precedents, to force persons' houses, break open escritoirs, seize their papers, &c., upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders' names are specified in the warrant, and therefore a discretionary power is given to messengers to search wherever their suspicion may chance to fall. If such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.

And as for the precedents, will that be esteemed law in a secretary of state which is not law in any other magistrate of this kingdom? If they should be found to be legal, they are certainly of the most dangerous consequences; if not legal, must aggravate damages. Notwithstanding what Mr. Solicitor General has said, I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the act itself (i).

As to the proof of what papers were taken away, the plaintiff could have no account of them; and those who

(i) As to this remark, see Broom's Comm. C. L. (6th ed.) p. 854; Mayne on Damages (3rd ed.) p. 513.

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of Pratt, C.J.

were able to have given an account (which might have been an extenuation of their guilt) have produced none. It lies upon the jury to allow what weight they think proper to that part of the evidence. It is my opinion the office precedents, which have been produced since the Revolution, are no justification of a practice in itself illegal, and contrary to the fundamental principles of the constitution; though its having been the constant practice of the office, might fairly be pleaded in mitigation of damages.

His lordship then told the jury they had a very material affair to determine upon, and recommended them to be cautious in bringing in their verdict.

Verdict.

The Jury, after withdrawing for near half an hour, returned, and found a general verdict upon both issues for the plaintiff, with 1000*l.* damages (*k*).

(*k*) After the verdict was recorded, the Solicitor General offered to prefer a Bill of Exceptions, which the Lord Chief Justice refused to accept, saying it was out of time.

The damages above awarded by the

jury would not be deemed "excessive." See *Beardmore v. Carrington*, 2 Wils. 244; *Huckle v. Money*, 19 St. Tr. 1404—5; *Wilkes v. Lord Halifax*, Id. 1406—1415, where the damages awarded were 4000*l.*

ENTICK *v.* CARRINGTON, 19 St. Tr. 1030 (*l*).

(6 Geo. 3, A.D. 1765).

SEIZURE OF PAPERS.

A warrant issued by a Secretary of State, to seize the papers of the author (named) of a seditious libel, is illegal (m).

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v.
CARRINGTON.

This was an action of trespass, brought by John Entick, clerk, against Nathan Carrington and three other messengers in ordinary to the king, in which the plaintiff declared that the defendants, on the 11th day of November, in the year 1762, at Westminster, broke and entered the dwelling-house of the plaintiff, and continued there four hours without his consent and against his will, and all that time disturbed him in the peaceable possession thereof, and broke open the doors to the rooms, the locks, iron bars, &c., thereto, affixed, and broke open the boxes, chests, drawers, &c., of the plaintiff in his house, and the locks thereto, and searched and examined all the rooms, &c., in his dwelling-house, and all the boxes, &c., so broke open, and read over, pried into and examined all the private papers, books, &c., of the plaintiff there found, whereby the secret affairs, &c., of the plaintiff became wrongfully discovered and made public; and took and carried away 100 printed charts, 100 printed pamphlets, &c., of the plaintiff there found, &c., to the plaintiff's damage of 2000*l*.

The defendant pleaded, 1st, not guilty to the whole declaration, whereupon issue was joined. 2ndly, as to the breaking and entering the dwelling-house, and continuing four hours, and all that time disturbing plaintiff in the possession thereof, and breaking open the doors, boxes,

Pleas.
Special justification under warrant of a Secretary of State.

(*l*) S. C. 2 Wils. 275.

(*m*) The warrant in this case is set out, *post*, p. 559.

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chests, drawers, &c., and the searching all the rooms, boxes, &c., and reading over, &c., the private papers, books, &c., there found, and taking and carrying away the goods and chattels, &c., the defendants said that the plaintiff ought not to have his action against them, because they said that before the supposed trespass, and before, until, and all the time of the supposed trespass, the Earl of Halifax was one of the lords of the king's Privy Council, and one of his principal Secretaries of State, and that the earl before the trespass made his warrant (*n*) under his hand and seal directed to the defendants. And the defendants further said, that afterwards, and before the trespass, the warrant was delivered to them to be executed, and thereupon they, by virtue and for the execution of the said warrant, entered the plaintiff's dwelling-house, the outer door thereof being then open, to search for and seize the plaintiff and his books and papers, in order to bring him and them before the said earl, according to the warrant; and the defendants did then find the plaintiff, and seized and apprehended him, and did search for his books and papers in his house, and did necessarily search and examine the rooms therein, and also his boxes, chests, &c., in order to find and seize his books and papers, and to bring them along with the plaintiff before the said earl, according to the warrant; and upon the said search did then in the said house find and seize the goods and chattels of the plaintiff in the declaration mentioned, and on the same day did carry the said books and papers to a house at Westminster, where the said earl transacted the business of his office, and delivered the same to Lovel Stanhope, Esq., who then was an assistant to the earl in his office, to be examined, and who was then authorised to receive the same from them for that purpose, as it was lawful for them to do; and the plaintiff afterwards (to wit) on the 17th of November in

(*n*) See the warrant set out at p. 559, *post*.

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the said year was discharged out of their custody ; and in searching for the books and papers of plaintiff the defendants did necessarily read over, and examine the said private papers, books, &c., of plaintiff, in the declaration mentioned, then found in his house ; and because at the said time, when, &c., the said doors in the said house leading to the rooms therein, and the said boxes, chests, &c., were shut and fastened so that the defendants could not search and examine the said rooms, boxes, chests, &c., they, for the necessary searching and examining the same, did then necessarily break and force open the said doors, boxes, chests, &c., as it was lawful for them to do ; and on the said occasion the defendants necessarily stayed in the house of plaintiff for the said four hours, and unavoidably during that time disturbed him in the possession thereof, they the defendants doing as little damage to plaintiff as they possibly could, which are the same breaking and entering the house of plaintiff, &c., whereof the plaintiff above complained, &c., wherefore they prayed judgment, &c.

To the above plea of justification the plaintiff replied *de injuriâ* (o) : There was another plea of justification like the first, with this difference only, that in the last plea it was alleged that the plaintiff and his papers, &c., were carried before Lord Halifax. To this plea also the plaintiff replied *de injuriâ*. Replication.

This cause was tried at Westminster Hall before the Lord Chief Justice, when the jury returned a Special Verdict to the following purport.

“ The jurors upon their oath say, as to the issue first joined (upon the plea of not guilty to the whole trespass in the declaration) that as to the coming with force and arms, and also the trespass in the declaration, except the breaking and entering the dwelling-house of the plaintiff, and continuing therein for the space of four hours, and all Special verdict.

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that time disturbing him in the possession thereof, and searching several rooms therein, and in one bureau, one writing-desk, and several drawers of the plaintiff in his house, and reading over and examining several of his papers there, and seizing, taking, and carrying away some of his books and papers there found, in the declaration complained of, the said defendants are not guilty. As to breaking and entering the dwelling-house, &c. (above excepted) the jurors on their oath say, that at the time of making the following information, and before and until and at the time of granting the warrant hereafter mentioned, and from thence hitherto, the Earl of Halifax was, and still is, one of the lords of the king's Privy Council, and one of his principal Secretaries of State, and that before the time in the declaration mentioned, viz., on the 11th of October, 1762, at St. James's, Westminster, one Jonathan Scott of London, bookseller and publisher, came before Edward Weston, Esq., an assistant to the said earl, and a justice of peace for the city and liberty of Westminster, and there made and gave information in writing to and before the said Edward Weston against the said John Entick and others, the tenor of which information now produced and given in evidence to the jurors, followeth, 'The voluntary information of J. Scott. In the year 1755, I proposed setting up a paper, and mentioned it to Dr. Shebbeare, and in a few days one Arthur Beardmore, an attorney-at-law, sent for me, hearing of my intention, and desired I would mention it to Dr. Shebbeare, that he Beardmore and some others of his friends had an intention of setting up a paper in the city. Shebbeare met Beardmore and myself and Entick (the plaintiff) at the Horn tavern, and agreed upon the setting up the paper by the name of the Monitor, and that Dr. Shebbeare and Mr. Entick should have 200*l.* a-year each. Dr. Shebbeare put into Beardmore's and Entick's hands some papers, but before the papers appeared Beardmore sent them back to me (Scott). Sheb-

Information
before a
justice of
the peace.

beare insisted on having the proportion of his salary paid him ; he had 50*l.*, which I (Scott) fetched from Vere and Asgill's by their note, which Beardmore gave him ; Dr. Shebbeare upon this was quite left out, and the monies have been continued to Beardmore and Entick ever since, by subscription, as I supposed, raised I know not by whom : it has been continued in these hands ever since. Shebbeare, Beardmore, and Entick all told me that the late Alderman Beckford countenanced the paper : they agreed with me that the profits of the paper, paying all charges belonging to it, should be allowed me. In the paper of the 22nd of May, I apprehend the character of Sejanus meant Lord Bute : the original manuscript was in the hand-writing of David Meredith, Mr. Beardmore's clerk. I before received the manuscript for several years till very lately from the said hands, and do believe that they continue still to write it. J. Scott, St. James's, 11th October, 1762.'

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verdict.

'The above information was given voluntarily before me, and signed in my presence by J. Scott.

J. WESTON.'

"And the jurors further say, that on the 6th of November, 1762, the said information was shown to the Earl of Halifax, and thereupon the earl did then make and issue his warrant directed to the defendants, then and still being the king's messengers, and duly sworn to that office, for apprehending the plaintiff, &c., the tenor of which warrant produced in evidence to the jurors, follows in these words and figures: 'George Montagu Dunk, Earl of Halifax, &c. one of the lords of his Majesty's honourable Privy Council, &c., and principal Secretary of State, &c., these are in his Majesty's name to authorise and require you, taking a constable to your assistance, to make strict and diligent search for John Entick, the author, or one concerned in writing of several weekly very seditious papers, intituled "The Monitor, or British Freeholder,"

The Secretary of State's warrant to seize plaintiff, his books and papers,—

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—
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verdict.

Nos. 357, &c., London, printed for J. Wilson and J. Fell, in Paternoster Row, which contain gross and scandalous reflections and invectives upon his Majesty's Government, and upon both Houses of Parliament; and him, having found, you are to seize and apprehend, and to bring, together with his books and papers, in safe custody before me to be examined concerning the premises, and further dealt with according to law; in the due execution whereof all mayors, sheriffs, justices of the peace, constables, and other his Majesty's officers civil and military, and loving subjects whom it may concern, are to be aiding and assisting to you as there shall be occasion; and for so doing this shall be your warrant. Given at St. James's, the 6th day of November, 1762, in the third year of his Majesty's reign, Dunk Halifax. To Nathan Carrington, James Watson, Thomas Ardran, and Robert Blackmore, four of his Majesty's messengers in ordinary.' And the jurors further say, the earl caused this warrant to be delivered to the defendants to be executed. And the defendants afterwards, on by virtue and for execution of the warrant, entered the house of the plaintiff, the outer door thereof being open, and the plaintiff being therein, to search for and seize the plaintiff and his books and papers, in order to bring him and them before the earl, according to the warrant; and the defendants did then find the plaintiff there, and did seize and apprehend him, and did there search for his books and papers in several rooms and in the house, and in one bureau, one writing desk, and several drawers of the plaintiff there, in order to find and seize the same, and bring them along with the plaintiff before the earl, according to the warrant, and did then find and seize there some of the books and papers of the plaintiff, and perused and read over several other of his papers which they found in the house, and chose to read, and necessarily continued there in the execution of the warrant four hours, and disturbed the plaintiff in his house, and then took him and his said

Warrant
delivered to
defendants
and exe-
cuted by
them.

books and papers from thence, and forthwith gave notice unto Lovel Stanhope, Esq., then before, and still being, an assistant to the earl in the examinations of persons, books, and papers seized by virtue of warrants issued by Secretaries of State, and also then and still being a justice of peace for the city and liberty of Westminster and county of Middlesex, of their having seized the plaintiff, his books and papers, and of their having them ready to be examined, and they then and there, at the instance of the said Lovel Stanhope, delivered the said books and papers to him. And the jurors further say, that, in the first year of the king, his Majesty gave and granted to the said Lovel Stanhope the office of law-clerk to the Secretaries of State. And the king did thereby appoint the law-clerk to attend the offices of his Secretaries of State, in order to take the depositions of all such persons whom it may be necessary to examine upon affairs which might concern the public, &c. (and then the verdict set out the letters patent to the law-clerk in *hæc verba*). And the jurors further say, that Lovel Stanhope, by virtue of the said letters patent long before the time when, &c., was, and ever since hath been and still is, law-clerk to the king's Secretaries of State, and hath executed that office all the time. And the jurors further say, that at different times from the time of the Revolution to this present time, the like warrants with that issued against the plaintiff, have been frequently granted by the Secretaries of State, and executed by the messengers in ordinary for the time being, and that each of the defendants did respectively take, at the time of being appointed messengers, the usual oath, that he would be a true servant to the king, &c., in the place of a messenger in ordinary, &c. And the jurors further say, that no demand was ever made or left at the usual place of abode of the defendants, or any of them, by the plaintiff, or his attorney or agent in writing of the perusal and copy of the said warrant, so issued against the plaintiff

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Special
verdict.

They carried
the books,
&c., to Lovel
Stanhope,
the law-
clerk, a
justice of
the peace.

Like war-
rants have
issued since
the Revo-
lution.

No demand
was made
by plaintiff
of a copy
of the war-
rant.

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Special
verdict.

Plaintiff did
not bring
his action
within six
months
after the
acts done by
defendants.

as aforesaid, neither did the plaintiff commence or bring his said action against the defendants, or any of them, within six calendar months next after the several acts aforesaid, were done as aforesaid; but whether, upon the whole matter as aforesaid by the jurors found, the said defendants are guilty of the trespass hereinbefore particularly specified in breaking and entering the house of the plaintiff, &c., or the said plaintiff ought to maintain his said action against them, the jurors are altogether ignorant, and pray the advice of the Court thereupon. And if upon the whole matter it shall seem to the Court that the defendants are guilty of the said trespass, the jurors say that the defendants are guilty, and they assess the damages of the plaintiff by occasion thereof, besides his costs and charges by him about his suit in this behalf laid out to 300*l.* and for those costs and charges, to 40*s.* But if upon the whole matter, it shall seem to the Court that the said defendants are not guilty; or that the plaintiff ought not to maintain his action against them; then the jurors do say that the defendants are not guilty.

The last
issue found
for plaintiff.

“And as to the last issue on the second special justification, the jury find for the plaintiff, that the defendants in their own wrong broke and entered, and did the trespass, as the plaintiff in his replication has alleged.”

Judgment.

This Special Verdict was twice solemnly argued at the bar (*o*); and after time taken to consider, Lord Camden, C. J., delivered the judgment of the Court for the plaintiff, as follows:

This record hath set up two defences to the action, on both of which the defendants have relied.

The first arises from the facts disclosed in the special verdict; whereby the defendants put their case upon the statute of 24 Geo. II., insisting, that they have nothing to do with the legality of the warrants, but that they ought

(*o*) To avoid repetition these arguments are here omitted. They will be found in 19 St. Tr. p. 1036 *et seq.*

to have been acquitted as officers within the meaning of that Act.

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TON.
—
Judgment.

The second defence stands upon the legality of the warrants; for this being a justification at common law, the officer is answerable if the magistrate has no jurisdiction.

These two defences have drawn several points into question, upon which the public, as well as the parties, have a right to our opinion.

Under the first, it is incumbent upon the defendants to show, that they are officers within the meaning of the Act of Parliament, and likewise that they have acted in obedience to the warrant.

The question, whether officers or not, involves another; whether the Secretary of State, whose ministers they are, can be deemed a justice of the peace, or taken within the equity of the description; for officers and justices are here correlative terms: therefore either both must be comprised or both excluded.

This question leads me to an inquiry into the authority of that minister, as he stands described upon the record in two capacities, viz., Secretary of State and Privy Counsellor. And since no statute has conferred any such jurisdiction as this before us, it must be given, if it does really exist, by the common law; and upon this ground he has been treated as a conservator of the peace.

The matter thus opened, the questions that naturally arise upon the special verdict, are:

I. Whether in either of these characters, or upon any other foundation, he is a conservator of the peace.

II. Admitting him to be so, whether he is within the equity of the 24 Geo. 2, c. 44.

These points being disposed of, the next in order is,

III. Whether the defendants have acted in obedience to the warrant.

IV. In the last place, the great question upon the justification will be, whether the warrant to seize and carry away the plaintiff's papers is lawful.

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CARRING-
TON.
—
Judgment.
Power of
Secretary
of State
considered.

I. The power of this minister, in the way wherein it has been usually exercised, is pretty singular.

If he is considered in the light of a privy counsellor, although every member of that board is equally entitled to it with himself, yet he is the only one of that body who exerts it. His power is so extensive in place, that it spreads throughout the whole realm; yet in the object it is so confined, that except in libels and some few state crimes, as they are called, the Secretary of State does not pretend to the authority of a constable.

To consider him as a conservator. He never binds to the peace, or good behaviour, which seems to have been the principal duty of a conservator; at least he never does it in cases where the law requires those sureties. But he commits in certain other cases, where it is very doubtful, whether the conservator had any jurisdiction whatever.

His warrants are chiefly exerted against libellers, whom he binds in the first instance to their good behaviour, which no other conservator ever attempted, from the best intelligence that we can learn from our books.

And though he doth all these things, yet it seems agreed, that he hath no power whatsoever to administer an oath or take bail.

This jurisdiction, as extraordinary as I have described it, is so dark and obscure in its origin, that counsel have not been able to form any certain opinion whence it sprang.

Sometimes they annex it to the office of Secretary of State, sometimes to the quality of privy counsellor; and in the last argument it has been derived from the king's royal prerogative to commit by his own personal command.

Whatever may have been the true source of this authority, it must be admitted, that at this day he is in the full legal exercise of it; because there has been not only a clear practice of it, at least since the Revolution,

confirmed by a variety of precedents; but the authority has been recognized and confirmed by two cases in the very point since that period: and therefore we have not a power to unsettle or contradict it now, even though we are persuaded that the commencement of it was erroneous.

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CARRING-
TON.
—
Judgment.
Power of
Secretary
of State
considered.

And yet, though the enquiry I am now upon cannot be attended with any consequence to the public, it is nevertheless indispensable; for I shall trace the power to its origin, in order to determine whether the person is within the equity of the 24th Geo. II.

Before I argue upon that point, or even state the question, whether the Secretary of State be within that Act, we must know what he is. This is no very agreeable task, since it may possibly tend to create, in some minds, a doubt upon a practice that has been quietly submitted to, and which is of no moment to the liberty of the subject; for so long as the proceedings under these warrants are properly regulated by law, the public is very little concerned in the choice of that person by whom they are issued.

A Secretary of State is in truth the king's private secretary. He is the keeper of the signet and seal used for the king's private letters, and backs the sign manual in transmitting grants to the privy seal. This seal is taken notice of in *Articuli super Cartas*, c. 6, and my Lord Coke in his comment upon that chapter (*p*), describes the secretary as I have mentioned. He says he has four clerks, that sit at his board; and that the law in some cases takes notice of the signet; for a *ne exeat regno* may be by commandment under the privy seal, or under the signet; and in this case the subject ought to take notice of it; for it is but a signification of the king's commandment. If at the time my Lord Coke wrote his 2nd Institute he had been acquainted with the authority

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—
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that is now ascribed to the secretary, he would certainly have mentioned it in this place. It was too important a branch of the office to be omitted; and his silence therefore is a strong argument, to a man's belief at least, that no such power existed at that time. He has likewise taken notice of this officer in *The Prince's Case* (q). He is mentioned in the stat. 27 Hen. 8, c. 11, and in the statute of the same king touching precedency (r), and it is observable, that he is called in these two statutes by the single name of secretary, without the addition, which modern times have given him, of the dignity of a State officer.

I do not know, nor do I believe, that he was anciently a member of the privy council; but if he was, he was not even in the times of James I. and Charles I., according to my Lord Clarendon, an officer of such magnitude as he grew up to after the Restoration, being only employed, by this account, to make up dispatches at the conclusion of councils, and not to govern or preside in those councils.

It is not difficult to account for the growth of this minister's importance. He became naturally significant from the time that all the courts in Europe began to admit resident ambassadors; for upon the establishment of this new policy, that whole foreign correspondence passed through the secretary's hands, who by this means grew to be an instructed and confidential minister.

This being the true description of his employment, I see no part of it that requires the authority of a magistrate. The custody of a signet can imply no such thing; nay, the contrary would rather be inferred from this circumstance; because if his power to commit was inherent in his office, his warrants would naturally be stamped with that seal; and in this light the privy seal, one should think, would have had the preference, as being highest

(q) 8 Rep. 1.

(r) 31 Hen. 8, c. 10.

in dignity and of more consideration in law. Besides all this, it is not in my opinion consonant to the wisdom or analogy of our law, to give a power to commit, without a power to examine upon oath, which to this day the Secretary of State doth not presume to exercise. Rokeby, J., in the case of *R. v. Kendal (s)*, says, that the one is incident to the other; and I am strongly of that opinion: for how can he commit, who is not able to examine upon oath (*t*)? What magistrate can be found, in our law, so defectively constituted? The only instance of this kind, that can be produced, is the practice of the House of Commons. But this instance is no precedent for other cases. The rights of that assembly are original and self-created; they are paramount to our jurisdiction, and above the reach of injunction, prohibition, or error (*u*). So that I still say, notwithstanding that particular case, there is no magistrate in our law so framed, unless the Secretary of State be an exception. Now Mr. Justice Rokeby and myself, though we agree in the principle, form our conclusions in a very different manner. He from the assumed power of committing, which ought first to have been proved, infers the incidental power of administering an oath. I on the contrary, from the admitted incapacity to do the latter, am strongly inclined to deny the former.

Again, if the Secretary of State is a common law magistrate, one should naturally expect to find some account of this in our books, whereas his very name is unknown; and there cannot be a stronger argument against his authority in that light, than the unsuccessful attempts that have been made at the bar to transform him into a conservator. These attempts have given us the trouble of looking into these books that have preserved the memory of these magistrates, who have been long since deceased and forgotten. Fitzherbert, Crompton

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(s) 5 Mod. 78.

(t) See Hawk. P. C., ed. by Leach, Bk. 2, c. 16, s. 4.

(u) Id. Bk. 2, c. 15, s. 73.

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——
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ton, Lambard, Dalton, Pulton, and Bacon, have all been searched to see, if any such person could be found amongst the old conservators. It is not material to repeat the whole number, and to range them in their several classes; but it will be sufficient to enumerate the principal ones; because they may be referred to some other part of the argument.

The king is mentioned as the first. Then come the chancellor, the treasurer, the high steward, the master of the rolls, the chief justice and the justices of the King's Bench; all the Judges in their several courts, sheriffs, coroners, constables; and some are said to be conservators by tenure, some by prescription, and others by commission (*x*). But no Secretary of State is to be found in the catalogue; and I do affirm, that no treatise, case, record, or statute, has ever called him a conservator, from the beginning of time down to the case of *Rex v. Kendal*.

The first time he appears in our books to be a grantor of warrants is in 29 & 30 Eliz., where the return to a Habeas Corpus was a commitment by Sir Francis Walsingham, principal secretary, and one of the privy council (*y*). The Court takes this distinction. Where a person is committed by one of the privy council, in such case the cause of the commitment should be set down in the return; but, on the contrary, where the party is committed by the whole council, there no cause need be alleged. The Court upon this ordered the return to be amended, and then the return is a commitment by the whole council.

There is a like case a little prior in point of time (*z*), where the commitment is by Sir Francis Walsingham, one of the principal secretaries, &c. Because the warden of the Fleet did not return for what cause Hellyard was

(*x*) Toml. L. Dict. "Conservator of the Peace."

(*y*) *Howell's Case*, 1 Leon. 70, 71.

(*z*) *Hellyard's Case*, 2 Leon. 175.

committed, the Court gives him day to mend his return, or otherwise the prisoner should be delivered. Nobody who reads this case can doubt, but that the, &c., must be supplied by the addition of privy counsellor, as in the other case.

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These authorities shew, that the judges of those days knew of no such committing magistrate as a Secretary of State. They pay no regard to that office, but treat the commitment as the act of the privy counsellor only; and to shew further that the privy counsellor as such was the only acting magistrate in state matters, all the twelve judges two years afterwards were obliged to remonstrate against the irregularities of their commitments, but take no notice of any such authorities practised by the Secretaries of State (a).

In the third year of the reign of King Charles I., when the House of Commons started that famous dispute upon the right claimed by the king and the privy council to commit without shewing cause (b), it is natural to expect that the secretary's warrant should have been handled, or at least named among the state commitments. But there is not throughout that long and learned discussion one word said about him, or his name so much as mentioned; and the Petition of Right, as well as all the proceedings that produced it, is equally silent upon the subject.

Again, when in the 16th year of the same king's reign the Habeas Corpus was granted by Act of Parliament (c), upon all state commitments, and where the omission of one mode of committing would have been fatal to the subject, and frustrated all the remedy of that Act, and where they have enumerated not only every method of committing that had been exercised, but every other that might probably exist in after times; yet the commitment

(a) *Ante*, p. 199.

(c) 16 Car. 1, c. 10, s. 8.

(b) See *Darnel's Case*, *ante*, p. 158.

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by a Secretary of State is not found amongst the number. If then he had power of his own to commit, this famous Act of Parliament was waste paper, and the subject still at the mercy of the Crown, without the benefit of the Habeas Corpus; a supposition altogether incredible: for who can believe, that this parliament, so jealous, so learned, so industrious, so enthusiastic of the liberty of the subject, when they were making a law to relieve prisoners against the power of the Crown, should bind the king, and leave his Secretary of State at large?

Whoever attends to all these observations will see clearly, that the Secretary of State in those days never exercised the power of committing in his own right; I say, in his own right, because that he did in fact commit, and that frequently even at the time when the matter of the Habeas Corpus was agitated in the 3rd of King Charles I., will appear from a passage in the *Ephemeris Parliamentaria* (d). This passage, when it comes to be attended to, will throw great light upon the present enquiry. It is sufficient of itself to convince me, from what source this practice first arose. It was from a delegation of the king's royal prerogative to commit by his own power, and from the king devolved in point of execution upon the Secretary of State. The passage I allude to is a speech of secretary Cook.

Whilst the parliament were disputing the king's authority to commit, either by himself or by his council, without shewing the cause, the king, who was desirous to pacify those discontents, and yet unwilling to part with his prerogative, sent a message to the House of Commons to assure them, that if they would drop the business, he would promise them, upon his royal word, not to use this prerogative contrary to law. Secretary Cook delivers this message, and then the book proceeds in these words. After speaking of himself and the nature of his place, he

says, "Give me leave freely to tell you, that I know by experience, that by the place I hold under his Majesty, if I will discharge the duty of my place and the oath I have taken to his Majesty, I must commit, and neither express the cause to the gaoler, nor to the judges, nor to any counsellor in England, but to the king himself. Yet do not think, I go without ground or reason, or take this power committed to me to be unlimited. Yea rather to me it is charge, burthen, and danger; for if I by this power commit the poorest porter, if I do not upon a just cause, if it may appear, the burthen will fall upon me heavier than the law can inflict; for I shall lose my credit with his Majesty and my place: and I beseech you consider, whether those who have been in the same place, have not committed freely, and not any doubt made of it, or any complaint made by the subject."

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To understand the meaning of this speech, I must briefly remind you of the nature of that famous struggle for the liberty of the subject between the Crown and the Parliament, which was then in agitation.

The points in controversy were these: whether a subject committing by the king's personal command, or by warrant of the privy council, ought to express the cause in the warrant, and whether the subject in that case was bailable.

The matter in dispute was confined to those two commitments. The Crown claimed no such right for any other warrant; nor did the Commons demand redress against any other. The statute of Westminster I., which was admitted on all sides to be the only foundation upon which the pretensions of the Crown were built, speaks of no other arrests in the text, but the king's arrest only; and the comment of law had never added any other arrest by construction, but that only of the privy council. No other commitment whatever was deemed by any man to be within the equity of that Act. The case, cited upon that occasion, speaks of no other commit-

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ments but these. Nay, the House of Lords, who passed a resolution in the heat of this business in favour of the king's authority, resolved only, that the king or his council could commit, but meddled with no other commitment (c). Secretary Cook tells them in this public manner, that he made a daily practice of committing without shewing the cause; yet the House takes no notice of any secretary's warrant as such, nor is the secretary's name mentioned in the course of all those proceedings. What then were those commitments mentioned by the secretary? They were certainly such only, as were *per speciale mandatum domini regis*. They could be no other. They were the commitments then under debate. They, and they only, were referred to by the king's message, and were consequently the subject matter of the secretary's apology; for no other warrant claimed that extraordinary privilege of concealing the cause.

This observation explains him, when he calls it a power committed to him; which I construe, not as annexed to his office, but specially delegated. This accounts too for his notion, that the law could not touch him; but that if he abused his trust, he should lose his credit with the king and his place, which he describes as a heavier punishment than the law could inflict upon him. Upon this ground it will be easy to explain the notable singularities of this minister's proceeding, which are not to be reconciled to any idea of a common-law magistrate. Such are his meddling only with a few state-offences, his reach over the whole kingdom, his committing without the power of administering an oath, his employment of none but the messenger of the king's chamber, and his command to mayors, justices, sheriffs, &c., to assist him; all which particularities are congruous enough to the idea of the king's personal warrant, but utterly inconsistent with all the principles of magistracy in a subject.

(c) See Cobbett, Parl. Hist., vol. 2, p. 351 *et seq.*

If on the other hand it can be understood, that he could and did commit without showing the cause, in his own right and by virtue of his office, then was his warrant admitted to be legal by the whole House, and without censure or animadversion. It was neither condemned by the Petition of Right, nor subject to the Habeas Corpus Act of Charles I.

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The truth of the case was no more than this. The council board were too numerous to be acquainted with every secret transaction that required immediate confinement; and the delay by summoning was inconvenient in cases that required dispatch. The Secretary of State, as most entrusted, was the fittest hand to issue sudden warrants; and therefore we find him so employed by Queen Elizabeth under the quality of a privy counsellor. But when the attempt failed, the judges declaring that he must shew the cause, and that they would remand none of his prisoners in any case but that of high treason, those warrants ceased, and then a new method was taken by making him the instrument of the king's *speciale mandatum*; for that is the form in which all warrants and returns were drawn, that were produced upon that famous argument.

Having thus shewn, not only negatively that this power of committing was not annexed to the secretary's office, but affirmatively likewise that he was notifier or counter-signer of the king's personal warrant acting *in alio jure* down to the time of the 16th of Charles I., and consequently to the Restoration, for there was no secretary in that interval, I have but little to add upon this head, but observing what passed between that time and the case of *Rex v. Kendal*.

The Licensing Act (f) gave him his first right to issue a warrant in his own name; not indeed to commit persons, but a warrant to search for papers. Whether upon

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this new power he grafted any authority to commit persons in his own right, as it should seem he did by the precedents produced the other day, is not very material. But it is remarkable, that during that interval he adhered in some cases to the old form, by specifying the express command of the king in this warrant.

With respect to the cases that have passed since the Revolution, such as *Rex v. Kendal*, *Rex v. Derby*, and *Rex v. Earbery*, I shall take no other notice of them in this place, than to say, they afford no light in the present inquiry by showing the ground of the officer's authority, though they are strong cases to confirm it.

But before I can fairly conclude, that the Secretary of State's power was derived from the king's personal prerogative and from no other origin, I must examine, what has passed relative to the power of a separate privy counsellor in this respect. This is the more necessary to be done, because my Lord Chief Justice Holt has built all his authority upon this ground; and the subsequent cases, instead of striking out any new light upon the subject, do all lean upon and support themselves by my Lord Chief Justice Holt's opinion in *Rex v. Kendal*.

I will therefore fairly state all that I have been able to discover touching the matter; and then, after I have declared my own opinion, shall leave others to judge for themselves.

In the first place it is proper to observe, that a privy counsellor cannot derive his authority from the statute of Westminster I., which recites an arrest by the command of the king to be one of those cases that were irreplevisable by the common law. The principal commentator upon these words is Staundford (*g*), who says, as to the commandment of the king, this is to be understood of the commandment of his own mouth, or of his council, which is incorporate to him, and speaks with the mouth of the

king himself ; for otherwise, if you will take these words of commandment generally, you may say that every *Capias* in a personal action is the command of the king. Lambard in his chapter of Bailment, where he cites this Act of Parliament, gives it the same construction, by allowing a commitment by the council to be within the equity of these words, "commandment of the king" (*h*). Thus far and no further, did the Crown lawyers in the 3rd of King Charles I. endeavour to extend the text of the law ; and it is plain from the cases before cited, that the judges in Queen Elizabeth's time were of the same opinion, that the argument could not be extended in favour of the single counsellor ; because they held, that he is bound to shew the cause upon his warrant, as distinguished from the other warrants, where they admit the cause need not be shewn.

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If he is not then entitled by this statute, is he empowered by the common law ? They, who contend he is, would do well to shew some authority in proof of their opinion. It is clear he is not numbered among the conservators. It is as clear that he is not mentioned by any book as one of the ordinary magistrates of justice with any such general authority.

The first place in which anything of this kind is to be found is the Year-Book of Henry VI., where the sheriff returns a detainer under the warrant of *duos de concilio pro rebus regem tangentibus*. This proof has an unlucky defect in it ; because the reading is doubtful, the word *dnos*, as it is written, standing as well for *dominos* as for *duos* ; so that till the reading is settled, which is beyond my skill, the authority must be suspended.

The next time you meet with a privy counsellor in the light of a magistrate is in the statute Edw. 6, c. 12, s. 19, where one of the privy council is empowered to take the accusation in some new treasons therein mentioned ; and

(*h*) Lamb. Eirenarch. Bk. 3, chap. 2.

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he is for this purpose joined with the justice of assize and justice of the peace. The like power is given him by stat. 5 & 6 Edw. 6, c. 11, s. 10, in a like case; and I find in Kelyng (*i*), that when the judges met to resolve certain points before the trial of the regicides, they resolved that a confession upon examination before a privy counsellor, though he be not a justice of the peace, is a confession within the meaning of the stat. 5 & 6 Edw. VI. That Act of Parliament had provided (*k*) that no person should be attainted of treason but upon the testimony of two lawful accusers, unless the said party arraigned should willingly without violence confess the same.

It seems to me that the ground upon which the judges proceeded in this resolution, was the express power given to the privy council in the clause next but one before that just mentioned, where the Act enables them to take the accusation in the new treasons there mentioned.

Whether they reasoned in that way, or whether they conceived that the power there given was a proof of some like power which they enjoyed to take accusation in the case of treasons at the common law, the book has not explained; so that hitherto this authority in the case of high treason stands upon a very poor foundation, being in truth no more than a conjecture of law without authority to support it.

The next authorities are the cases already recited, which to the present point prove nothing more than this: that the judges do admit a power in a privy counsellor to commit without specifying in what cases. They demand the cause, and a better return; whereupon Sir Francis Walsingham, instead of relying upon his power as privy counsellor, returns a new warrant signed by the whole board.

Two years after this came forth that famous resolution

(*i*) P. 19.

(*k*) Sect. 12.

of all the judges, 34th of Elizabeth (l). There is no occasion to observe how arbitrary the prerogative grew, and how fast it increased towards the end of this Queen's reign. It seems to me as if the privilege claimed by the king's personal warrant, and from him derived to the council-board, by construction, had somehow or other been adopted by every individual of that board; for, in fact, these warrants became so frequent and oppressive, that the courts of justice were obliged at last to interpose.

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However they might be overborne by the terror of the king's special command, either in or out of council, they had courage enough to resist the novel encroachments of the separate members; and therefore they did in the Courts of King's Bench and Common Pleas set at large many persons so committed; upon which occasion, a question being put to the judges to specify in what cases the prisoner was to be remanded, they answer the question with a remonstrance of their own against the illegal warrants granted by the privy counsellors. The preamble relates entirely to these commitments, wherein they desire that some good order may be taken, that her highness's subjects may not be committed or detained in prison by commandment of any nobleman against the laws of the realm.

The question is this: In what cases prisoners sent to custody by her Majesty, her council, or any one or more of her council, are to be detained in prison and not to be delivered by her Majesty's courts or judges.

The answer is, "We think that if any person be committed by her Majesty's commands from her person, or by order from the council-board, or if any one or two of her council commit one for high treason, such persons so in the case before committed may not be delivered by any of her courts without due trial by the law and judgment

(l) Anderson, 297; cited *ante*, p. 199.

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of acquittal had. Nevertheless the judges may award the queen's writs to bring the bodies of such persons before them: and if upon return thereof the cause of the commitment be certified to the judges, as it ought to be, then the judges, in the cases before, ought not to deliver him, but to remand the prisoner to the place from whence he came, which cannot conveniently be done unless notice of the causes in generality, or else specially, be given to the keeper or gaoler that shall have the custody of such prisoner."

There is a studied obscurity in this opinion, which shows how cautious the judges were obliged to be in those dangerous times, for whether they meant to acknowledge a general power in the king or his council to commit, as distinguished from a special power in one or more of his council to commit only in the case of high treason; or whether this case of high treason is to be referred to all the commitments as the only unbailable case; or again, whether in the superior commitment by the royal person or his council, they would deliver the prisoner though no cause was specified; or if one of the council committed for offences below high treason where they declare they would not remand, yet whether they would absolutely discharge or only upon bail, is altogether either ambiguous or uncertain.

It is evident to me that the judges did not intend to be understood, touching these matters; and the only propositions that are clearly laid down in this resolution are these:—

1st. That they would never remand upon the counsellor's commitment but in high treason;

2ndly. That the cause ought to be shewed in all cases.

This resolution grew to be much agitated afterwards in the 3rd of Charles I., and had the honour, like other dark oracles, to be cited on both sides.

Thus much it was necessary to observe upon this famous opinion; because it was upon this opinion that

Lord Chief Justice Holt principally relied (*m*). At this time it is apparent that all the privy counsellors exercised this right in common. Whatever it was, the complaint shews it was a general practice and a privilege enjoyed by all the members of that board; whence it is natural to suppose that if the power was well founded, the same practice would have continued to this time in the same way, seeing how tenacious all men are of those things that are called rights and privileges. Instead of this, it doth not appear that the council from that era have ever asserted their rights; and now at last, when the Secretary of State has revived the claim for the common benefit, as it would seem, of the whole body, no other person has followed this example, or knows to this moment that he is entitled to such right. Anybody who considers what the consequence must have been from these determinations of the judges, might venture to affirm that the privy counsellor's warrant from this period ceased and grew out of use; for as the cause in this case was necessary to be specified, and the prisoner was never to be remanded but in the case of high treason, that warrant became at once unserviceable, and the Crown was forced to resort to the royal mandate or the board-warrant, which, notwithstanding the case in *Anderson*, was still insisted to be unailable and good without a cause.

Hence happened that in the great debate in the 3rd of King Charles I. no privy counsellor's warrants do once occur, but instead thereof you find the Secretary of State dealing forth the king's royal mandate, and the privy counsellor's authority at rest.

The only reason why I touch upon these proceedings is for the sake of observing that no notice is taken in those arguments of the privy counsellor's right to commit; and yet the power of the king himself, and of his council, by the statute of Westminster I., is largely

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discussed, and so fully handled, that if the warrant of one privy counsellor had then been in use, it must have been brought forth in the argument; for if it could have served no other purpose, it would have been material in order to mark the distinction between that and the warrant of the whole board.

From these observations I conclude, that these warrants were then deceased and gone, and would probably have never made their appearance again, even in description, if the stat. 16 Charles I. c. 10, had not recalled them to memory, not as things either then in use or admitted to be legal, but as one of the modes of commitment which might be again revived, because it had been formerly practised (*n*). Therefore when this form of warrant appears, as it does in the catalogue of other forms, both legal and illegal, no argument can be raised from a pretended recognition of this particular warrant; since it was necessary to name every mode that ever had been used by the king, the council, or the Star Chamber, in order to make the remedy by Habeas Corpus universal.

But if there can be a doubt whether this Act of Parliament is to be deemed a recognition of this authority, there is a passage in the Journal of the House of Commons that proves the contrary in direct terms.

Whilst this bill was passing, the House makes an amendment, which appears by the question put to be this: Whether the House should assent to the putting the word "liberties" out of the bill.

But as the passage in the bill is not mentioned in the Journals, it must be collected by inferences. By the phrase "left out of the bill," I presume it was permitted to stand in the preamble. Now when you look into the preamble, the word "liberties" is there to be found in that part of the preamble which recites this usurpation of

(*n*) See Hawk. P. C., ed. by Leach, Bk. 2, c. 15, s. 71.

the Privy Council upon the liberties as well as the properties of the subject; whereas the enacting clause condemns only the jurisdiction of that board, so far as it assumed a jurisdiction over the property of the subject; whence I collect that the word "liberties" stood in that clause; and the passage that follows in the Journal does strongly confirm it.

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The words are these: "Resolved upon the question, that this House does assent to the putting of the word 'liberties' out of the bill concerning the Star Chamber and council pleadings; because the House has a bill to be drawn to provide for the liberty of the subject in a large manner. Mr. Serjeant Wild and Mr. Whitelock are appointed to draw a bill to that purpose upon the several points that have been here this day debated.

"Resolved upon the question, that the body of the lords of the council, nor any one of them in particular as a privy counsellor, has any power to imprison any free-born subject, except in such cases as they are warranted by the statutes of the realm."

It is pretty plain from this passage, that the debate turned upon the meaning of the statute of Westminster I., and the resolution of the judges in Anderson, about which it is not fit to give any opinion; my design by citing this passage being only to show, that this Act of Parliament does not even prove the actual practice of such warrants at that time, much less does recognize their legality.

What follows is still more remarkable touching this business, upon a doubt started in the trial of the Seven Bishops (o). They were committed by a warrant signed by no less than thirteen privy counsellors; but the warrant did not appear to be signed by them in council. The objection taken was, that the warrant was void, being signed only by the privy counsellors separately, and not

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in a body. If any man in Westminster Hall at that time had understood, that one or more privy counsellors had a right to commit for a misdemeanor, that would have been a flat answer to the objection; but they are so far from insisting upon this, that all the king's counsellors, as well as the Court, do admit the warrant would have been void, if it could be taken to be executed by them out of council.

The Solicitor General upon that occasion cites the 16 Charles 1, c. 10, which statute is produced and read, and yet no argument is taken thence to prove the authority of the separate lords, though the Act is before them. Mr. Pollexfen in the course of the debate says, "We do all pretty well agree, for aught I can perceive, in two things. We do not deny, but that the council-board has power to commit. They on the other side do not affirm, that the lords of the council can commit out of the council.

"*Attorney General.* Yes, they may as justices of the peace.

"*Pollexfen.* This is not pretended to be so here.

"*L. C. J.* No, no, that is not the case."

The Court at last got rid of the objection, by presuming the warrant to have been executed in council.

There cannot be a stronger authority than this I have now cited for the present purpose. The whole body of the law, if I may use the phrase, were as ignorant at that time of a privy counsellor's right to commit in the case of a libel, as the whole body of privy counsellors are at this day.

The counsel on both sides in that cause were the ablest of their time, and few times have produced abler. They had been concerned in all the state-cases during the whole reign of King Charles II., on one side or the other; and to suppose that all these persons could be utterly ignorant of this extraordinary power, if it had been either legal or even practised, is a supposition not to be maintained.

This is the whole that I have been able to find, touch-

ing the power of one or more privy counsellors to commit; and to sum up the whole of this business in a word it stands thus:

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The two cases in Leonard (*p*) do pre-suppose some power in a privy counsellor to commit, without saying what; and the case in Anderson (*q*) does plainly recognize such a power in high treason: but with respect to his jurisdiction in other offences, I do not find it was either claimed or exercised.

In consequence of all this reasoning, I am forced to deny the opinion of my Lord Chief Justice Holt (*r*) to be law, if it shall be taken to extend beyond the case of high treason. But there is no necessity to understand the book in a more general sense; nor is it fair indeed to give the words a more large construction: for as the conclusion ought always to be grounded on the premises, and the premises are confined to the case of high treason only, the opinion should naturally conform to the cases cited, more especially as the case there before the Court was a case of high treason, and they were under no necessity to lay down the doctrine larger than the case required.—Now whereas it has been argued, that if you admit a power of committing in high treason, the power of committing in lesser offences follows *à fortiori*; I beg leave to deny that consequence, for I take the rule with respect to all special authorities to be directly the reverse. They are always strictly confined to the letter; and when I see therefore, that a special power in any single case only has been permitted to a person, who in no other instance is known or recorded by the common law, as a magistrate, I have no right to enlarge his authority one step beyond that case. Consider how strange it would sound, if I should declare at once, that every privy counsellor without exception is invested with a power to commit in all offences, without exception, from high treason down to

(*p*) *Ante*, p. 568.

(*q*) *Ante*, p. 577.

(*r*) *R. v. Kendal*, 5 Mod. 78.

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trespass, when it is clear that he is not a conservator. It might be said of me, He should have explained himself a little more clearly, and told us where he had found the description of so singular a magistrate, who being no conservator was yet in the nature of a conservator.

I have now finished all I have to say upon this head; and am satisfied, that the Secretary of State hath assumed this power as a transfer, I know not how, of the royal authority to himself; and that the common law of England knows no such magistrate. At the same time I declare, wherein my brothers do all agree with me, that we are bound to adhere to the determination of *R. v. Derby*, and *R. v. Earbury*; and I have no right to overturn those decisions, even though it should be admitted, that the practice, which has subsisted since the Revolution, had been erroneous in its commencement.

The Secretary of State having now been considered in the two lights of Secretary and Privy Counsellor, and likewise as the substitute of the royal mandate; in the two first he is clearly no conservator; in the last, if he can be supposed to have borrowed the right of conservatorship from the Sovereign himself, yet no one will argue or pretend, that so great a person, one so high in authority, can be deemed a justice of the peace within the equity of the 24th of Geo. II.

However, I will for a time admit the Secretary of State to be a conservator, in order to examine, whether in that character he can be within the equity of this Act.

Whether
24 Geo. 2,
c. 44,
applies.

II. Upon this question, I shall take into consideration the 7 Jac. 1, c. 5, because, though it is not material upon this record to determine, whether the special evidence can be admitted under the general issue of not guilty, the defendant having in this instance justified; yet as that Act is made in *câdem materiâ*, and for the benefit of the same persons, the rule of construction observed in that will in great measure be an authority for this.

The 24th of Geo. II. is entitled, "An Act for the rendering justices of the peace more safe in the execution of their offices, and for indemnifying constables and others acting in obedience to their warrants." The preamble runs thus: "Whereas justices of the peace are discouraged in the execution of their offices, by vexatious actions brought against them, for or by reason of small and involuntary errors in their proceedings; and whereas it is necessary that they should be, as far as is consistent with justice and the safety and liberty of the subjects over whom their authority extends, rendered safe in the execution of the said office and trust; and whereas it is also necessary, that the subject should be protected from all wilful and oppressive abuse of the several laws committed to the care and execution of the said justices of peace." Then comes the enacting part.

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The only granter of the warrant in the enacting part, as well as the preamble, is the justice of the peace. The officers, as they are described, are constables, headboroughs, and other officers or persons acting by their orders, or in their aid. If any person acting in obedience to such warrant, and producing the said warrant upon demand, is afterwards prosecuted for such act, the statute says, he shall be acquitted, upon the production of such warrant. The counsel for the defendants say, the secretary and the messengers are both within the equity of this Act. The first is a justice of the peace, because he is a conservator. If so, the latter is his officer, which I will admit. The proposition then is, that conservators are within the equity of this Act. They are clearly not within the letter; for justice and conservator are not convertible terms; and though it should be admitted, that a justice of the peace is still a conservator, yet a conservator is not a justice.

The defendants have argued upon two rules of construction, which in truth are but one.

1. Where in a general Act a particular is put as an

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example, all other persons of like description shall be comprised.

2. Where the words of a statute enact a thing, it enacts all other things in like degree.

In Plowden (*t*), several cases are cited as authorities under these rules of construction; as, that the Bishop of Norwich in one Act shall mean all bishops; that the warden of the Fleet shall mean all gaolers; that justices of a division mean all justices of the county at large; that guardian in socage after the heir's attaining fourteen, shall be a bailiff in account; that executors shall include administrators, and tenant for years a tenant for one year or any less time; with several other instances to the like purpose.

In the first place, though the general rule be true enough, that where it is clear the person or thing expressed is put by way of example, the judges must fill up the catalogue; yet we ought to be sure, from the words and meaning of the Act itself, that the thing or person is really inserted as an example.

This is a very inaccurate way of penning a law; and the instances of this sort are scarce ever to be found, except in some of the old Acts of Parliament. And wherever this rule is to take place, the Act must be general, and the thing expressed must be particular; such as those cases of the warden of the Fleet and the Bishop of Norwich: whereas the Act before us is equally general in all its parts, and requires no addition or supply to give it the full effect. Therefore if this way of arguing can be maintained by either of these rules, it must fall under the second, which is, that where the words of a statute enact a thing, it enacts all other things in like degree.

In all cases that fall within this rule, there must be a perfect resemblance between the persons or things ex-

pressed and those implied. Thus for instance, administrators are the same thing with executors; tenant for half a year and tenant for years have both terms for a chattel interest, differing only in the duration of the term; and so of the rest, which I need not repeat one by one: and, in all these cases, the persons or things to be implied are in all respects the objects of the law as much as those expressed. Does not everybody see from hence that you must first examine the law before you can apply the rule of construction? For the law must not be bent by the construction, but that must be adapted to the spirit and sense of the law. The fundamental rule then, by which all others are to be tried, is laid down in *Wimbish v. Tailbois* (*u*), according to which the best guide is to follow the intent of the statute. Again, according to Plowden (*x*), the construction is to be collected out of the words according to the true intent and meaning of the Act, and the intent of the makers may be collected from the cause or necessity of making the Act, or by foreign circumstances.

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Let us try the present case by these rules; and let the justice of the peace stand for a moment in this Act as a magistrate at large: and then compare him as he is here described, with the conservator.

The justice here is a magistrate intrusted with the execution of many laws, liable to actions for involuntary errors, and actually discouraged by vexatious suits; in respect of which perilous situation he is intended to be rendered more safe in the execution of his office.—He is besides a magistrate, who acts by warrant directed to constables and other officers, namely, known officers who are bound to execute his warrants.

Now take the conservator.—He is intrusted with the execution of no laws, if the word “law” is understood to mean statutes, as I apprehend it is. He is liable to no

(*u*) Plowd. 57. 58.

(*x*) Pp. 205, 231.

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actions, because he never acts; the keeping of the peace being so completely transferred to and so engrossed by the justice, that the name of conservator is almost forgot. He is far from being discouraged by actions. No man ever heard of an action brought against a conservator as such; unless you will call a constable a conservator, which will not serve the present purpose, because these persons can hardly be deemed justices within the Act. Again, how does it appear that the conservator could either grant a warrant like the present, or command a constable to execute it? These powers are at least very doubtful; but I think I may take it for granted that the conservator could not command a messenger of the king's chamber.

Did then this Act of Parliament refer to magistrates of known authority and daily employment, or to antiquated powers and persons known to have existed by historical tradition only? Did it mean to redress real grievances, or those that were never felt? *Ad ea, quæ frequenter accidunt, jura adaptantur.*

From this comparison it may appear how little there is to drag the conservator into the law, who hardly corresponds with the justice of the peace in any one point of the description. But further, it is unfortunate for the conservators upon this question that one half of them are the objects of the statute by name, as constables, &c., and yet not one of their acts as conservators is within the provision.

And now give me leave to ask one question. Will the Secretary of State be classed with the higher or the lower conservator? If with the higher, such as the king, the chancellor, &c., he is too much above the justice to be within the equity. If with the lower, he is too much below him. And as to the sheriff and the coroner, they cannot be within the law, because they never grant such warrants as these. So that at last, upon considering all the conservators, there is not one that does not stand

most evidently excluded, unless the Secretary of State himself shall be excepted.

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But if there wanted arguments to confute this pretension, the construction that has prevailed upon the 7 Jac. I. would decide the point. That is an Act of like kind to relieve justices of the peace, mayors, constables, and certain other officers, in troublesome actions brought against them for the legal execution of their offices; who are enabled by that Act to plead the general issue. Now that law has been taken so strictly that neither churchwardens nor overseers were held to be within the equity of the word "constables," although they were clearly officers, and acted under the justices' warrants. Why? Because that Act, being made to change the course of the common law, could not be extended beyond the letter. If then that privilege of giving the special matter in evidence upon the general issue is contrary to the common law, how much more substantially is this Act an innovation of the common law, which indemnifies the officer upon the production of the warrant, and deprives the subject of his right of action?

It is impossible that two Acts of Parliament can be more nearly allied or connected with one another than that of 24 Geo. II., and that of 7 James I. The objects in both are the same, and the remedies are similar in both, each of them changing the common law for the benefit of the parties concerned. The one in truth is the sequel or second part of the other. The first not being an adequate remedy in case of the several persons therein mentioned, the second is added to complete the work, and to make them as secure as they ought to be made from the nature of the case. If by a contrary construction any person should be admitted into the last who is not included in the first, that person, whoever he is, will be without the privilege of pleading the general issue, and giving the special matter in evidence, which the latter would have certainly given by express words, if the

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parliament could have imagined he was not comprised in the first.

Upon the whole, we are all of opinion that neither Secretary of State, nor the messenger, is within the meaning of this Act of Parliament.

Did the defendants
act in obedience to
the warrant?

III.—But if they were within the general equity, yet it behoved the messengers to show that they have acted in obedience to the warrant; for it is upon that condition that they are intitled to the exemption of the Act. When the legislature excused the officer from the perilous task of judging, they compelled him to an implicit obedience, which was but reasonable: so that now he must follow the dictates of his warrant, being no longer obliged to inquire whether his superior had or had not any jurisdiction. The late decision of the Court of King's Bench in the *Case of General Warrants* (y) was ruled upon this ground, and rightly determined.

This part of the case is clear, and shall be dispatched in very few words.

1st, the defendants did not take with them a constable, which is a flat objection. They had no business to dispute either the propriety or the legality of this direction in the execution of the warrant; nor have their counsel any right to dispute it here in their behalf. They can have no other plea, under this Act of Parliament, than ignorance and obedience.

2ndly, they did not bring the papers to the Earl of Halifax, to be examined according to the tenor of the warrant, but to Mr. Lovel Stanhope. This command ought to have been literally pursued; nor is it any excuse to say now, as they do in their plea, that Mr. Lovel Stanhope was an assistant to the Earl of Halifax. If he is a magistrate he can have no assistant, nor deputy, to execute any part of that employment. The right is personal to himself, and a trust that he can no more delegate

(y) *Money v. Leach*, ante, p. 522.

to another than a justice of the peace can transfer his commission to his clerk.

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I shall say no more upon this head. But I cannot help observing that the Secretary of State, who has not been many years intrusted with this authority, has already eased himself of every part of it, except the signing and sealing the warrant. The law clerk, as he is called, examines both persons and papers. He backs or discharges. This is not right. I could wish for the future that the secretary would discharge this part of his office in his own person.

IV.—The question that arises upon the special verdict being now dispatched, I come in my last place to the justification; for the defendants, having failed in the attempt made to protect themselves by the stat. 24 Geo. 2, c. 44, are under a necessity to maintain the legality of the warrant under which they have acted, and to show that the Secretary of State, in the instance now before us, had no jurisdiction to seize the defendant's papers. If he had no such jurisdiction, the law is clear, that the officers are as much responsible for the trespass as their superior.

Was the
warrant
legal?

This, though it is not the most difficult, is the most interesting question in the cause; because if this point should be determined in favour of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the Secretary of State shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel.

The messenger, under this warrant, is commanded to seize the person described, and to bring him with his papers to be examined before the Secretary of State. In consequence of this, the house must be searched; the lock and doors of every room, box, or trunk must be broken open: all the papers and books without exception,

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if the warrant be executed according to its tenor, must be seized and carried away; for it is observable that nothing is left either to the discretion or to the humanity of the officer.

This power so assumed by the Secretary of State is an execution upon all the party's papers, in the first instance. His house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in it.

This power, so claimed by the Secretary of State, is not supported by one single citation from any law book extant. It is claimed by no other magistrate in this kingdom but himself: the great executive hand of criminal justice, the Lord Chief Justice of the Court of King's Bench, Chief Justice Scroggs excepted (z), never having assumed this authority.

The arguments, which the defendants' counsel have thought fit to urge in support of this practice, are of this kind.

That such warrants have issued frequently since the Revolution, which practice has been found by the special verdict; though I must observe that the defendants have no right to avail themselves of that finding, because no such practice is averred in their justification.

That the case of the warrants bears a resemblance to the case of search for stolen goods.

They say, too, that they have been executed without resistance upon many printers, booksellers, and authors, who have quietly submitted to the authority; that no action hath hitherto been brought to try the right; and that although they have been often read upon the returns of *habeas corpus*, yet no court of justice has ever declared them illegal.

(z) *Post*, p. 601.

And it is further insisted, that this power is essential to government, and the only means of quieting clamours and sedition.

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These arguments, if they can be called arguments, shall be all taken notice of, because upon this question I am desirous of removing every colour of plausibility.

Before I state the question, it will be necessary to describe the power claimed by this warrant in its full extent.

If honestly exerted, it is a power to seize that man's papers who is charged upon oath to be the author or publisher of a seditious libel; if oppressively, it acts against every man who is so described in the warrant, though he be innocent.

It is executed against the party, before he is heard or even summoned; and the information, as well as the informers, is unknown.

It is executed by messengers with or without a constable (for it can never be pretended that such is necessary in point of law) in the presence or the absence of the party, as the messengers shall think fit, and without a witness to testify what passes at the time of the transaction; so that when the papers are gone, as the only witnesses are the trespassers, the party injured is left without proof.

If this injury falls upon an innocent person, he is as destitute of remedy as the guilty: and the whole transaction is so guarded against discovery, that if the officer should be disposed to carry off a bank-bill he may do it with impunity, since there is no man capable of proving either the taker or the thing taken.

It must not be here forgot that no subject whatsoever is privileged from this search; because both Houses of Parliament have resolved that there is no privilege in the case of a seditious libel (*p*).

Nor is there pretence to say that the word "papers"

(*p*) 29 Comm. Journ. 689; Cobbett, Parl. Hist., vol. 15, pp. 1362 *et seq.*

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here mentioned ought in point of law to be restrained to the libellous papers only. The word is general, and there is nothing in the warrant to confine it; nay, I am able to affirm that it has been upon a late occasion executed in its utmost latitude: for in the case of *Wilkes v. Wood* (q), when the messengers hesitated about taking all the manuscripts, and sent to the Secretary of State for more express orders for that purpose, the answer was, "all must be taken, manuscripts and all." Accordingly all was taken, and Mr. Wilkes's private pocket-book filled up the mouth of the sack.

I was likewise told in the same cause by one of the most experienced messengers, that he held himself bound by his oath to pay an implicit obedience to the commands of the Secretary of State; that in common cases he was contented to seize the printed impressions of the papers mentioned in the warrant; but when he received directions to search further, or to make a more general seizure, his rule was to sweep all. The practice has been correspondent to the warrant.

Such is the power, and therefore one would naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant.

If it is law, it will be found in our books; if it is not to be found there, it is not law.

The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law, are various. Distresses, executions, forfeitures, taxes, &c., are all of this description; wherein every man by common consent gives up that right for the sake of justice and the general good. By the laws of England every invasion of private property,

(q) *Ante*, p. 544.

be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show, by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books, and see if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.

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According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass.

Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.

But though it cannot be maintained by any direct law, yet it bears a resemblance, as was urged, to the known case of search and seizure for stolen goods.

I answer, that the difference is apparent. In the one, I am permitted to seize my own goods, which are placed in the hands of a public officer till the felon's conviction shall entitle me to restitution. In the other, the party's own property is seized before and without conviction, and he

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has no power to reclaim his goods, even after his innocence is cleared by acquittal.

The case of searching for stolen goods crept into the law by imperceptible practice. It is the only case of the kind that is to be met with. No less a person than my Lord Coke denied its legality (*r*) ; and therefore if the two cases resembled each other more than they do, we have no right, without an Act of Parliament, to adopt a new practice in the criminal law, which was never yet allowed from all antiquity.

Observe, too, the caution with which the law proceeds in this singular case.—There must be a full charge upon oath of a theft committed.—The owner must swear that the goods are lodged in such a place.—He must attend at the execution of the warrant, to show them to the officer, who must see that they answer the description.—And, lastly, the owner must abide the event at his peril : for if the goods are not found, he is a trespasser ; and the officer being an innocent person, will be always a ready and convenient witness against him (*s*).

On the contrary, in the case before us nothing is described nor distinguished : no charge is requisite to prove that the party has any criminal papers in his custody : no person present to separate or select : no person to prove in the owner's behalf the officer's misbehaviour.—To say the truth, he cannot easily misbehave unless he pilfers ; for he cannot take more than all.

If it should be said that the same law which has with so much circumspection guarded the case of stolen goods from mischief, would likewise in this case protect the subject by adding proper checks ; would require proofs beforehand ; would call upon the servant to stand by and overlook ; would require him to take an exact inventory, and deliver a copy ; my answer is, that all these precau-

(*r*) 4 Inst. 176.

Bk. 2, chap. 13, s. 17.

(*s*) See Hawk. P. C., ed. by Leach,

tions would have been long since established by law, if the power itself had been legal; and that the want of them is an undeniable argument against the legality of the thing.

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What would the Parliament say if the judges should take upon themselves to mould an unlawful power into a convenient authority by new restrictions? That would be not judgment but legislation.

I come now to the practice since the Revolution, which has been strongly urged, with this emphatical addition: that an usage tolerated from the era of liberty, and continued downwards to this time through the best ages of the constitution, must necessarily have a legal commencement. Now, though that pretence can have no place in the question made by this plea, because no such practice is there alleged; yet I will permit the defendants for the present to borrow a fact from the special verdict, for the sake of giving it an answer.

If the practice began then, it began too late to be law now. If it was more ancient, the Revolution is not to answer for it; and I could have wished that upon this occasion the Revolution had not been considered as the only basis of our liberty.

The Revolution restored this constitution to its first principles. It did no more. It did not enlarge the liberty of the subject, but gave it a better security. It neither widened nor contracted the foundation, but repaired and perhaps added a buttress or two to the fabric; and if any minister of state has since deviated from the principles at that time recognized, all that I can say is that, so far from being sanctified, they are condemned by the Revolution.

With respect to the practice itself, if it goes no higher, every lawyer will tell you it is much too modern to be evidence of the common law; and if it should be added, that these warrants ought to acquire some strength by the silence of those Courts, which have heard them read so often upon returns without censure or animadversion, I am able to borrow my answer to that pretence from the

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Court of King's Bench, which lately declared with great unanimity in the *Case of General Warrants* (t), that as no objection was taken to them upon the returns, and the matter passed *sub silentio*, the precedents were of no weight. I most heartily concur in that opinion; and the reason is more pertinent here, because the Court had no authority in the present case to determine against the seizure of papers which was not before them; whereas in the other they might, if they had thought fit, have declared the warrant void, and discharged the prisoner *ex officio*.

This is the first instance I have met with where the ancient immemorable law of the land, in a public matter, was attempted to be proved by the practice of a private office.

The names and rights of public magistrates, their power and forms of proceeding as they are settled by law, have been long since written, and are to be found in books and records. Private customs, indeed, are still to be sought from private tradition. But who ever conceived a notion that any part of the public law could be buried in the obscure practice of a particular person?

To search, seize, and carry away all the papers of the subject upon the first warrant: that such a right should have existed from the time whereof the memory of man runneth not to the contrary, and never yet have found a place in any book of law, is incredible. But if so strange a thing could be supposed, I do not see how we could declare the law upon such evidence.

But still it is insisted that there has been a general submission, and no action brought to try the right.

I answer, there has been a submission of guilt and poverty to power and the terror of punishment. But it would be strange doctrine to assert that all the people of this land are bound to acknowledge that to be universal

(t) *Ante*, p. 544.

law which a few criminal booksellers have been afraid to dispute.

The defendants upon this occasion have stopped short at the Revolution. But I think it would be material to go further back, in order to see how far the search and seizure of papers have been countenanced in the antecedent reigns.

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First, I find no trace of such a warrant as the present before that period, except a very few, that were produced the other day, in the reign of King Charles II.

But there did exist a search warrant, which took its rise from a decree of the Star-Chamber. The decree is found at the end of the 3rd volume of Rushworth's Collections (*u*). It was made in the year 1636, and recites an older decree upon the subject in the 28th of Elizabeth, by which probably the same power of search was given.

By this decree the messenger of the press was empowered to search in all places, where books were printing, in order to see if the printer had a licence; and if upon such search he found any books which he suspected to be libellous against the church or state, he was to seize them, and carry them before the proper magistrate.

It was very evident that the Star-Chamber, how soon after the invention of printing I know not, took to itself the jurisdiction over public libels, which soon grew to be the peculiar business of that court. Not that the courts of Westminster Hall wanted the power of holding pleas in those cases; but the Attorney-General for good reasons chose rather to proceed there; which is the reason why we have no cases of libels in the King's Bench before the Restoration.

The Star-Chamber from this jurisdiction presently usurped a general superintendence over the press, and exercised a legislative power in all matters relating to the subject. They appointed licensers; they prohibited

(*u*) *Et vide* Rush. Coll. Part II. vol. i. p. 404.

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books ; they inflicted penalties ; and they dignified one of their officers with the name of the messenger of the press, and among other things enacted this warrant of search.

After that court was abolished, the press became free, but enjoyed its liberty not above two or three years ; for the Long Parliament thought fit to restrain it again by ordinance. Whilst the press is free, I am afraid it will always be licentious, and all governments have an aversion to libels. This parliament, therefore, did by ordinance restore the Star-Chamber practice ; they recalled the licences, and sent forth again the messenger. It was against the ordinance, that Milton wrote that famous pamphlet called *Areopagitica*. Upon the Restoration, the press was free once more, till the 13th and 14th of Charles II., when the Licensing Act (*x*) passed, which for the first time gave the Secretary of State a power to issue such warrants : but these warrants were neither so oppressive nor so inconvenient as the present. The right to inquire into the licence was the pretence of making the searches ; and if during the search any suspected libels were found, they and they only could be seized.

This Act expired the 32nd year of that reign, or thereabouts. It was revived again in the 1st year of King James II., and remained in force till the 5th of King William, after one of his parliaments had continued it for a year beyond its expiration.

I do very much suspect that the present warrant took its rise from these search warrants that I have been describing ; nothing being easier to account for than this engraftment ; the difference between them being no more than this, that the apprehension of the person in the first was to follow the seizure of papers, but the seizure of papers in the latter was to follow the apprehension of the

(*x*) 13 & 14 Car. 2, c. 33.

person. The same evidence would serve equally for both purposes. If it was charged for printing or publishing, that was sufficient for either of the warrants. Only this material difference must always be observed between them, that the search warrant only carried off the criminal papers, whereas this seizes all.

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When the Licensing Act expired at the close of King Charles II.'s reign, the twelve judges were assembled at the king's command, to discover whether the press might not be as effectually restrained by the common law, as it had been by that statute.

I cannot help observing in this place, that if the Secretary of State was still invested with a power of issuing this warrant, there was no occasion for the application to the judges; for though he could not issue the general search warrant, yet upon the least rumour of a libel he might have done more, and seized everything. But that was not thought of, and therefore the judges met and resolved:

1st. That it was criminal at common law, not only to write public seditious papers and false news; but likewise to publish any news without a licence from the king though it was true and innocent.

2ndly. That libels were seizable. This is to be found in the State Trials (y); and because it is a curiosity, I will recite the passages at large.

At the trial of Harris for a libel, *per* Scroggs, Chief Justice:—

“Because my brethren shall be satisfied with the opinion of all the judges of England what this offence is, which they would insinuate, as if the mere selling of books was no offence; it is not long since that all the judges met by the king's commandment, as they did some time before: and they both times declared unanimously, that all persons that do write, or print, or sell any

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pamphlet that is either scandalous to public or private persons, such books may be seized, and the persons punished by law; that all books which are scandalous to the government may be seized, and all persons so expounding may be punished: and further, that all writers of news, though not scandalous, seditious, nor reflective upon the government or state, yet if they are writers (as there are few others) of false news, they are indictable and punishable upon that account."

It seems the Chief Justice was a little incorrect in his report; for it should seem as if he meant to punish only the writer of false news. But he is more accurate afterwards in the trial of Carr for a libel (z)—

"*Sir G. Jeffries*, Recorder. All the judges of England having met together to know whether any person whatsoever may expose to the public knowledge any matter of intelligence, or any matter whatsoever that concerns the public, they give it in as their resolution that no person whatsoever could expose to the public knowledge anything that concerned the affairs of the public, without licence from the king, or from such persons as he thought fit to entrust with that power."

Then Scroggs takes up the subject, and says, "The words I remember are these. When by the king's command we were to give in our opinion, what was to be done in point of regulation of the press, we did all subscribe, that to print or publish any news-books or pamphlets, or any news whatsoever, is illegal; that it is a manifest intent to the breach of the peace, and they may be proceeded against by law for an illegal thing. Suppose now that the thing is not scandalous, what then? If there had been no reflection in this book at all, yet it is *illicitè* done, and the author ought to be convicted for it."

These are the opinions of all the twelve judges of England; a great and reverend authority.

Can the twelve judges extrajudicially make a thing law to bind the kingdom by a declaration that such is their opinion?—I say, No.—It is a matter of impeachment for any judge to affirm it. There must be an antecedent principle or authority from whence this opinion may be fairly collected; otherwise the opinion is null, and nothing but ignorance can excuse the judge that subscribed it. Out of this doctrine sprang the famous general search-warrant that was condemned by the House of Commons; and it was not unreasonable to suppose that the form of it was settled by the twelve judges that subscribed the opinion.

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The deduction from the opinion to the warrant is obvious. If you can seize a libel, you may search for it: if search is legal, a warrant to authorize that search is likewise legal: if any magistrate can issue such a warrant, the Chief Justice of the King's Bench may clearly do it.

It falls here naturally in my way to ask whether there be any authority besides this opinion of these twelve judges to say that libels may be seized? If they may, I am afraid that all the inconveniences of a general seizure will follow upon a right allowed to seize a part. The search in such cases will be general, and every house will fall under the power of a Secretary of State to be rummaged before proper conviction.—Consider for a while how the law of libels now stands.

Lord Chief Justice Holt and the Court of King's Bench have resolved in *Rex v. Bear (a)*, that he who writes a libel, though he neither composes nor publishes it, is criminal. Lord Coke (*b*) cites it in the Star-Chamber, that if a libel concerns a public person, he that hath it in his custody ought immediately to deliver it to a magistrate, that the author may be found out.

(a) Carth. 407, S.C. 1 Lord 417, 646.
Raym. 414; 12 Mod. 299; 2 Salk. (b) 5 Rep. 125.

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In the case of *Lake v. Hutton* (c), it is observed that a libel, though the contents are true, is not to be justified; but the right way is to discover it to some magistrate or other, that he may have cognizance of the cause.

In *Ventris* (d), it is said that the having a libel, and not discovering it to a magistrate, was only punishable in the Star-Chamber, unless the party maliciously publish it. But the Court corrected this doctrine in *R. v. Bear*, where it said, though he never published it, yet his having it in readiness for that purpose, if any occasion should happen, is highly criminal: and though he might design to keep it private, yet after his death it might fall into such hands as might be injurious to the government; and therefore men ought not to be allowed to have such evil instruments in their keeping (e). In *Salkeld's* report of the same case (f), Holt, C. J., says, if a libel be publicly known, a written copy of it is evidence of a publication.

If all this be law, and I have no right at present to deny it, whenever a favourite libel is published (and these compositions are apt to be favourites) the whole kingdom in a month or two becomes criminal, and it would be difficult to find one innocent jury amongst so many millions of offenders.

I can find no other authority to justify the seizure of a libel, than that of *Scroggs* and his brethren.

If the power of search is to follow the right of seizure, everybody sees the consequence. He that has it or has had it in his custody; he that has published, copied, or maliciously reported it, may fairly be under a reasonable suspicion of having the thing in his custody, and consequently become the object of the search-warrant. If libels may be seized, it ought to be laid down with precision, when, where, upon what charge, against whom, by what magistrate, and in what stage of the prosecution.

(c) Hob. 252.

(d) Vol. i., p. 31.

(e) Carth. 409.

(f) Salk. 418.

All these particulars must be explained and proved to be law, before this general proposition can be established.

As therefore no authority in our books can be produced to support such a doctrine, and so many Star-Chamber decrees, ordinances, and Acts have been thought necessary to establish a power of search, I cannot be persuaded, that such a power can be justified by the common law.

I have now done with the argument which has endeavoured to support this warrant by the practice since the Revolution.

It is then said, that it is necessary for the ends of government to lodge such a power with a state officer; and that it is better to prevent the publication before than to punish the offender afterwards. I answer, if the legislature be of that opinion, they will revive the Licensing Act. But if they have not done that, I conceive they are not of that opinion. And with respect to the argument of State necessity, or a distinction that has been aimed at between State offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions.

Serjeant Ashley was committed to the Tower in the 3rd of Charles I. by the House of Lords only for asserting in argument, that there was a "law of State" different from the common law (*g*); and the Ship-money judges were impeached for holding, first, that State necessity would justify the raising money without consent of parliament; and secondly, that the king was judge of that necessity.

If the king himself has no power to declare when the law ought to be violated for reason of State, I am sure we his judges have no such prerogative.

Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shown, where the law forceth evidence out of the owner's custody by process.

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There is no process against papers in civil causes. It has been often tried but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action.

In the criminal law such a proceeding was never heard of; and yet there are some crimes, such, for instance, as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper-search in these cases to help forward the conviction.

Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say.

It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty.

Observe the wisdom as well as mercy of the law. The strongest evidence before a trial, being only *ex parte*, is but suspicion; it is not proof. Weak evidence is a ground of suspicion, though in a lower degree; and if suspicion at large should be a ground of search, especially in the case of libels, whose house would be safe?

If, however, a right of search for the sake of discovering evidence ought in any case to be allowed, this crime above all others ought to be excepted, as wanting such a discovery less than any other. It is committed in open daylight, and in the face of the world; every act of publication makes new proof; and the solicitor of the treasury, if he pleases, may be the witness himself.

The messenger of the press, by the very constitution of his office, is directed to purchase every libel that comes forth, in order to be a witness.

Nay, if the vengeance of Government requires a produc-

tion of the author, it is hardly possible for him to escape the impeachment of the printer, who is sure to seal his own pardon by his discovery. But suppose he should happen to be obstinate, yet the publication is stopped, and the offence punished. By this means the law is satisfied, and the public secured.

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I have now taken notice of everything that has been urged upon the present point; and upon the whole we are all of opinion, that the warrant to seize and carry away the party's papers in the case of a seditious libel, is illegal and void.

Before I conclude, I desire not to be understood as an advocate for libels. All civilized governments have punished calumny with severity; and with reason; for these compositions debauch the manners of the people; they excite a spirit of disobedience, and enervate the authority of Government; they provoke and excite the passions of the people against their rulers, and the rulers oftentimes against the people.

After this description, I shall hardly be considered as a favourer of these pernicious productions. I will always set my face against them, when they come before me; and shall recommend it most warmly to the jury always to convict when the proof is clear. They will do well to consider, that unjust acquittals bring an odium upon the press itself, the consequence whereof, may be fatal to liberty; for if kings and great men cannot obtain justice at their hands by the ordinary course of law, they may at last be provoked to restrain that press, which the juries of their country refuse to regulate. When licentiousness is tolerated, liberty is in the utmost danger; because tyranny, bad as it is, is better than anarchy; and the worst of governments is more tolerable than no government at all.

In the year 1764 and the two following years the legality of General Warrants was from time to time under the consideration of parliament, and during the debates in the

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House of Commons upon this subject, it was argued, *inter alia*, as follows :—(h)

That if general warrants describing the offence do not give officers a right to seize the innocent, they throw in the way of messengers a temptation to inquire into the life and character of persons, and thus tend to convert these subordinate ministers of justice into so many spies and informers, and that such an enquiry, even when conducted in the discreetest manner, might injure the most virtuous in their reputation and fortune.

That if a general warrant for seizing the authors, printers, and publishers of a libel, seditious and treasonable in the eye of a minister, be liable to objection, one for seizing their papers is still more so, since papers may be treated in a manner highly injurious to their owners before they can get into the hands of a minister, who, to glut his revenge, may combine or disjoin them, so as to make of them engines capable of working the destruction of the most innocent persons.

That even a particular warrant to seize seditious papers alone, without mentioning the titles of them, may prove highly detrimental, since in that case all a man's papers must be indiscriminately examined, and such examination may bring things to light which it may not concern the public to know, and which yet it may prove highly detrimental to the owners to have made public.

That great as might be the mischiefs to individuals of general warrants for seizing the persons and papers of those guilty of writing seditious and even treasonable libels, the mischiefs attending general warrants against the printers and publishers of such libels, unless these libels carry something seditious or treasonable in their very title, or they have been legally declared such, must be still greater to the public, since, if such warrants were allowed, printers and publishers to be safe must read

(h) Cobbett, Parl. Hist. vol. 15, pp. 1393 *et seq.*; vol. 16, pp. 6 *et seq.*

everything passing through their hands, and of course would print or publish very little, the consequence of which must be a "suppression of the press," an evil more prejudicial to the public than almost any abuse of it can be.

That the cases, if any, in which it might be proper to endeavour to secure by a general warrant the persons, and by almost any warrant the papers, of those concerned in the writing, printing, and publishing of seditious, and what a minister might think proper to style treasonable libels, are so few that they may be justly ranked amongst those very uncommon events against which the legislature has not thought proper to make any provision.

And it was accordingly resolved (*i*), "That a general warrant for apprehending the author, printer, or publisher of a libel being illegal, except in cases provided for by Act of Parliament, is, if executed on the person of a member of this House, also a breach of the privilege of this House" (*j*). "That the seizing or taking away the papers of the author, printer, or publisher of a libel, or the supposed author, printer, or publisher of a libel, is illegal, and that such seizing or taking away the papers of a member of this House is a breach of the privilege of this House."

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The Resolutions of the House of Commons above set out, conjointly with the opinions strongly expressed by the most eminent contemporary Judges, not merely in the Principal Cases, but also on other like occasions (*k*),

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(*i*) 30 Comm. Journ. pp. 753, 772, A.D. 1776, April 22 & 25.

(*j*) See the debates respecting the legality of general warrants, Cobbett, Parl. Hist. vol. 15, pp. 1393 *et seq.*; vol. 16, pp. 6 *et seq.*; 207—209.

(*k*) In *Huckle v. Money*, 19 St. Tr. 1404, 1405, where the plaintiff was journeyman printer, the jury found

a verdict for him, with 300*l.* damages; and upon a motion for a new trial for the excessiveness of the damages, Lord Chief Justice Pratt, in delivering his opinion, is reported to have expressed himself as follows: "The personal injury done to the plaintiff was very small; so that if the jury had been confined by their oath to consider the

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seem to have conclusively set at rest the question as to the legality of general warrants issued by a Secretary of State, in that capacity, and under circumstances such as have appeared. At the trial, indeed, A.D. 1776, of the action *Sayre v. The Earl of Rochford* (1) for false imprisonment and seizure of the plaintiff's papers, the pleas in justification alleged that the defendant was, at the time when the occurrence complained of took place, one of the lords of his Majesty's Privy Council, and one of his Majesty's principal Secretaries of State; and that, upon an information upon oath, by one Richardson, against the plaintiff, for treasonable practices, the defendant did issue his warrant to arrest the plaintiff for high treason, and to seize his papers; and did issue another warrant to commit him close prisoner to the Tower; wherein the

mere personal injury only, perhaps 20*l.* damages would have been thought damages sufficient; but the small injury done to the plaintiff, and the inconsiderableness of his station and rank in life did not appear to the jury in that striking light, in which the great point of law touching the liberty of the subject appeared to them at the trial. They saw a magistrate over all the king's subjects, exercising arbitrary power, violating Magna Carta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them: they heard the king's counsel, and saw the solicitor of the Treasury endeavouring to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on the trial: and I think they have done right in giving exemplary damages. To enter a man's house by virtue of a

nameless warrant in order to procure evidence, is worse than the Spanish inquisition, a law under which no Englishman would wish to live an hour: it was a most daring public attack made upon the liberty of the subject. I thought that the 29th chapter of Magna Carta, *Nullus liber homo capiatur vel imprisonetur, &c., nec super eum ibimus, &c., nisi per legale iudicium parium suorum vel per legem terre, &c.*, which is pointed against arbitrary power, was violated. I cannot say what damages I should have given if I had been upon the jury, but I directed and told them they were not bound to any certain damages. . . . Upon the whole, I am of opinion the damages are not excessive."

See also, *per* Wilmot, C.J., *Wilkes v. Lord Halifax*, 19 St. Tr. 1406—1415.

(1) 19 St. Tr. 1286.

ground of commitment was stated to be "treasonable practices." In this case there could be no doubt that the original warrant, so far as it related to a seizure of the plaintiff's papers, was illegal, nor does any serious contention in support of that direction in it seem to have been made; the verdict passed in favour of the plaintiff, with 1000*l.* damages, although judgment was finally entered for the defendant owing to a miscarriage at the trial in regard to the reception of evidence. We may, therefore, accept Mr. Burke's remark (*m*) as strictly accurate, that "the lawful secrets of business and friendship were rendered inviolable" by the foregoing Resolution of the House of Commons condemnatory of the seizure of papers.

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The law, as now recognised upon the subject before us, may thus, without undue repetition (*n*), be epitomised. The Sovereign cannot personally arrest a man or commit a man by word of mouth (*o*), though he may do so by matter of record (*p*), or warrant setting forth the offence charged, in order that the Court may determine whether it be known to our law; if so, whether it be bailable or not. The power thus inherent in the Sovereign has, by him in practice been delegated to his Privy Council, or to his Secretaries of State; the power of these high officials to interfere with the subjects' liberty being restricted to cases only where treason or treasonable practices (*q*) are assignable, as showing ground for its exercise. This

(*m*) Short Account of a late Short Administration, Burke's Works (Ed. 1852), vol. iii. p. 1.

(*n*) Compare *ante*, pp. 161, 173, 184-5, 189, 207, 211. *Et vide* the three Principal Cases.

(*o*) 2 Inst. 186.

(*p*) *Id.*

(*q*) *R. v. Despard*, 7 T. R. 736, 742, where Lord Kenyon, C. J., observes: "I have no difficulty in saying that the Secretaries of State have the right to commit. This right was not even doubted by Lord Camden." *Acc. Judgm. Harrison v. Bush*, 5 E. & B. 353.

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power does not extend to authorise the seizure of papers of an accused person.

The right asserted by a Secretary of State to seize, open, and peruse letters passing through the Post Office, was some years since investigated in Parliament with jealous apprehension (*r*), as being akin to the claim to seize papers so forcibly repudiated by Lord Camden. It was, however, found on investigation, that the exercise of such a power can be traced from the earliest institutions in this country for the conveyance of letters, and from Orders in Council, A.D. 1626 and 1627 (*s*); that upon the first establishment, by ordinance (*t*), of a regular Post Office, such institution was stated to be the best means for discovering and preventing many dangerous and wicked designs against the Commonwealth; that in letting to farm the Post Office to individuals, and in proclamations of the 25th of May, 1663, and 25th of August, 1683, the power in question is distinctly claimed and reserved; that the terms in which the provisions of the stat. 9 Ann. c. 10 upon this subject, are enacted, can only be explained upon the supposition that such power was at that time fully recognised, inasmuch as the said Act gives no power to the Secretary of State to detain or open letters, but prohibits others from doing so, except "by an express warrant in writing, under the hand of one of the principal Secretaries of State for every such opening, detaining, or delaying" (*u*); and that the subsequent statutes, 35 Geo. 3, c. 62, and 7 Will. 4 & 1

(*r*) See particularly Hansard, vol. lxxv. pp. 892, 974, 1264; vol. lxxvii. pp. 668 *et seq.*, 834, 932; vol. lxxix. p. 307.

(*s*) Report from the Secret Committee (Lords) relative to the Post

Office, August, 1844. Hansard, vol. lxxvi. p. 311; and see May, Const. Hist. vol. ii. p. 294.

(*t*) Ordinance, A.D. 1656, c. 30, Preamble; Scobell, p. 511.

(*u*) 9 Ann. c. 10. s. 40.

Vict. c. 36 (*x*), adopted nearly the same form of recognition.

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The power claimed by a Secretary of State to open letters, appears, therefore, to have been exercised from a very early period, and to have been recognised by several Acts of Parliament. It has been exerted for effecting either of two purposes. First of tracing persons accused of offences, or property embezzled by suspected offenders; such warrants having been issued whenever application has been made (*y*) to the Under Secretary of State, upon grounds which have seemed to the Principal Secretary to justify such proceeding; and having in some instances led to the apprehension and conviction of offenders, and to the recovery of property.

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Secondly, warrants, such as are now under our notice, have been issued by Secretaries of State at periods when the circumstances of the country have seemed to threaten public tranquillity, and with a view to promoting the interests of the community (*z*).

Around persons clothed with an official character is cast by our law a peculiar protection; whether the alleged liability arise out of contract or out of tort, on grounds of political expediency, some special protection is extended to them.

Protection
is extended
to public
officers on
grounds of
policy.

In *Gidley v. Lord Palmerston* (*a*), the action—in assumpsit — was brought by plaintiff as executor of a deceased clerk in the War Office, against the defendant,

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(*x*) Sec. 25, which, declaring penal the unauthorised detention of letters in the Post Office, contains, *inter alia*, a proviso that “nothing herein contained shall extend to the opening or detaining or delaying of a post-letter in obedience to an express warrant

in writing under the hand of one of the principal Secretaries of State.”

(*y*) Usually by magistrates or by solicitors conducting prosecutions.

(*z*) See Report, *supra*, n. (*s*).

(*a*) 3 Brod. & B. 275.

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then Secretary-at-War, to recover the arrears of a retired allowance, payable to the deceased annually out of monies voted by Parliament, and placed at the disposal of the Secretary, for defraying charges such as mentioned, and it was sought to make the defendant liable, as having impliedly promised that he would pay to the deceased or to the plaintiff as his executor the annual sum which had been specifically voted by Parliament for that purpose. On behalf of the plaintiff, it was argued that the money voted by Parliament for the deceased had, by virtue of such vote, become vested in him, and that it was held by the defendant, in order that it might be applied under the terms in which it had been appropriated. The Court held, however, that the action was not maintainable. The duty owing by the defendant to the plaintiff was (observed the Court) alleged to have arisen in an official and public character, not to have resulted from any relation to or employment by the plaintiff, or under any undertaking to be personally responsible to him. "There is therefore," proceeded the Court, "no duty from which the law can imply a promise to pay to the testator during his life, or to his executor after his death, nor can money be said to have been had and received to the use of the testator; which money belonged to the Crown, being received as the money of the Crown, and the party receiving it being responsible only to the Crown in his public character" (*b*). So in the recent case of *Palmer v. Hutchinson* (*c*), which was an action against the Deputy Commissary-General of Natal in his official capacity for hire of waggons and stores during the Zulu war,

*Palmer v.
Hutchinson.*

(*b*) And see *Reg. v. Commissioners of Inland Revenue*, 12 Q. B. D. 461, per Brett, M. R., at p. 471. (c) 6 App. Cas. 619; 50 L. J., P. C. 62.

the Privy Council, after quoting from the judgment above abstracted, remarked, "Any funds which may be issued by Government to the Commissariat Department for the service of the State stand upon the same footing as that above described with reference to the money received by the Secretary at War" (*d*). But besides this somewhat technical reasoning, a broader ground was in both the above cases presented for the judgment of the court. "An action will not lie against a public agent, for anything done by him in his public character or employment, though alleged to be, in the particular instance, a breach of such employment, and constituting a particular and personal liability;" for "such persons are not understood personally to contract" (*e*).

On principles of public policy an action will not lie against a person acting in a public character and situation, which from its very nature might expose him to an infinite multiplicity of actions—to an action at the instance of any person who might suppose himself aggrieved; the very liability to such suits would, in all probability, prevent any prudent person from accepting a public situation at the hazard of peril to himself. Public servants, therefore, are not understood personally to contract, the presumption being rather that they contract on behalf of Government and the Crown (*f*).

In *Kinlock v. The Secretary of State for India* (*g*), certain booty of war had been granted by the Crown to

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(*d*) 6 App. Cas. at p. 627.

(*e*) 3 Brod. & B. p. 286.

(*f*) See *Unwin v. Wolseley*, 1 T. R. 674; *Macbeath v. Haldimand*, *Id.* 172; *Palmer v. Hutchinson*, 6 App. Ca. 619; 50 L. J., P. C. 62; *Grant v. Secretary of State for India*, 2

C. P. D. 445; 46 L. J., C. P. 681; and *per* Pollock, B., *Hill v. Metropolitan Asylum District*, 4 Q. B. D. 441; 48 L. J. Q. B. 566.

(*g*) 7 App. Ca. 619; 51 L. J., Ch. 885.

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the defendant "in trust" for the officers and men of certain military forces in proportions to be determined finally by him in case of difference, and it was attempted to compel the defendant to account for such funds on the footing of a trust in equity. The House of Lords, however, held that no trust enforceable in equity was created by the warrant making the grant, and that no action could be maintained against the Secretary of State, who was merely constituted the agent of the Crown for the purpose of distributing the booty (*h*).

—tort.

Then as regards the liability of a public servant—one clothed with an official character—*ex delicto*. It is clear that for an act *per se* wrongful and injurious to another, for an injury in the strict legal sense of that term, he will be liable, a position resting on principles "alike essential to uphold the dignity of the Crown on the one hand, and the rights and liberties of the subject on the other" (*i*); and even where the Sovereign, as head of the Executive, or the Government may be irresponsible through lack of remedy appropriate, it will by no means follow that the agent likewise is so. Thus in *Rogers v. Rajendro Dutt* (*k*), the owner of a steam tug sued the defendant, an officer styled Superintendent of Marine, in the public service of the East India Company, to recover for damage caused by an order issued in his official capacity forbidding the officers of the Bengal Pilot Service to allow the plaintiff's tug to take any ship in tow, of which they should have charge. The action,

(*h*) In *Kinlock v. Reg.* the Court of Appeal (21st March, 1884) held, that no Petition of Right could be maintained in the above circumstances. See also *Cooper v. Reg.*, 14

Ch. D. 311; 49 L. J. Ch. 490.

(*i*) *Per* Cockburn, C. J., *Feather v. Reg.*, 35 L. J., Q. B. 209.

(*k*) 13 Moo. P. C. C. 209, cited, Judgm. 16 C. B. N. S. 360-1.

it was urged, would lie upon the ground, that the plaintiff had vested in him a right to employ his vessel in towing—a right of exercising his lawful trade or calling without undue hindrance or obstruction from others (*l*), and that this right, vested in the plaintiff, had been invaded by the defendant. The Privy Council held, however, that there was no *injuria*, nothing which could give a right of action, fully admitting, nevertheless, that if there had been evidence of injury, the defendant could not have shielded himself from responsibility behind the Government, whose servant he was. “Neither does it seem to conclude the question,” observed the Court, “that the particular act complained of is to be considered as the act of Government, and that in the part which defendant took in it he acted merely as the officer of the Government, intending to discharge his duty as a public servant with perfect good faith, and with an entire absence of malice, particular or general, against the plaintiff. For if the act of the defendant was in itself wrongful as against the plaintiff, and produced damage to him, he (the plaintiff) must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorised, or whether it was done by order of the superior power. The civil irresponsibility of the supreme power for tortious acts could not be theoretically maintained with

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(*l*) *The Case of Monopolies*, 10 St. Tr. 312; S. C. 11 Rep. 84, and *The Tailors' Case*, 11 Rep. 53, were cited in support of the argument, *supra*; in the latter of which it was resolved, that at the common law no man can be prohibited from working at any legal trade, for the law abhors idleness; and again, it was resolved that

without an Act of Parliament none can be in any manner restrained from working at a lawful trade. It was, however, in *Rogers v. Rajendro Dutt*, vainly attempted to bring the case, *sub judice*, within the scope of the principle thus affirmed in the time of James I.

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any show of justice, if its agents were not personally responsible for them; in such cases the Government is morally bound to indemnify its agent, and it is hard on such agent where this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration" (*m*); that is to say, special circumstances may render even a public servant personally responsible for acts *bonâ fide* done by him on behalf of the public, which, in contemplation of law, injuriously affect another.

Such is the rule, cautiously stated by one of the highest tribunals, which is to guide us in determining the liability *ex delicto* of the Executive towards the subject. The head of the Executive we know (*n*) cannot in virtue of the ordinary maxim *respondet superior* be made answerable for the remissness or negligence of its servants; and without special appeal to the authorities, it might safely be conceded that the command of the Sovereign conveyed to his minister to do an act within the functions of such minister, and within the constitutional powers of the Crown, would bar any remedy by action against the minister, at suit of one feeling himself aggrieved and damaged by the act (*o*). If this were not so, how could the executive machinery work at all or public functions be fully and faithfully discharged? Instances of immunity induced by obedience to the orders of Government and the Crown will, in succeeding Notes, abundantly present themselves; the doctrine as above enunciated in *Rogers v.*

(*m*) Judgm. 13 Moo. P. C. C, 236.
See *Bartlett v. Baker*, 34 L. J. Ex. 8.

(*n*) *Ante*, p. 244; *et vide* Note to
Sutton v. Johnstone, *post*.

(*o*) See *per* Cockburn, C.J., *Dickson*
v. Viscount Combermere, 3 Fost. &
Fin. 585, cited *post*; *O'Byrne v. Lord*
Hartington, 11 Ir. R. C. L. 445.

Rajendro Dutt may for our immediate purpose be sufficient.

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Lastly, as on the one hand our law will condignly punish persons who presume to libel the servants of the state (*p*), so will it require from those on whom public duties are devolved a strict account. Great offenders, on impeachment by the House of Commons (*q*), minor criminals, in the ordinary course of justice, will for corrupt practices, fraud, oppression or extortion, be severely visited (*r*).

In *Rex v. Bembridge* (*s*) an information had been filed by the Attorney General against the defendant, for malversation as accountant in the office of the Paymaster-General of the Forces and as one of his deputies. The office held by the defendant was one of public trust and confidence; he was employed in the passing and checking of accounts, involving large sums belonging to the public, and he was proved to have been guilty of corruptly and fraudulently concealing specific amounts, due to the public from,—and which were a charge upon,—the Paymaster-General. The gist of the offence alleged against the defendant, therefore, was the corrupt and fraudulent breach of a public duty, and the Court was here called upon to apply established principles to a state of facts which, as it would seem, had never before *in specie* occurred; for Lord Mansfield, C. J., on motion made for a new trial of the case, or in arrest of judgment, remarked: “Though the principle upon which this pro-

(*p*) See, for instance, *R. v. Cobbett*, 29 St. Tr. 1; *R. v. Fitzpatrick*, 31 *Id.* 1169.

(*q*) See *Trial of Viscount Melville*, 29 St. Tr. 549.

(*r*) Stephen, Dig. Crim. Law, Arts.

118, 119, 121.

(*s*) 22 St. Tr. 1; 3 Doug. 327; *R. v. Jones*, 31 *Id.* 251; *R. v. Duncombe*, 13 *Id.* 1062; *R. v. Wyatt*, 1 Salk. 381.

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secution is instituted may be as old as the constitution, yet the specific case is new, and no instance precisely and exactly the same is found upon the records of Westminster Hall; therefore it is not only important to the defendant, but highly important to the kingdom at large, that the facts of this case, the evidence by which they are supported, the guilt which arises out of them, and the law in consequence of that, so far as relates to the present occasion, should be known with accuracy and precision." Lord Mansfield accordingly proceeded to lay down two principles for our guidance under circumstances such as were *sub judice*.

1st. If a man accepts an office of trust and confidence concerning the public, especially when attended with profit, he is answerable to the Crown for his execution of that office, and, if so, he can only be answerable in a criminal prosecution, for the Crown cannot otherwise punish misbehaviour. The distinction between the two modes of procedure, by information or indictment and by action, is in this part of his judgment clearly illustrated by Lord Mansfield, who cites a precedent of an information against the *custos breviarum*, a clerk of the Court of Common Pleas, whose office was to receive and file writs returnable in that Court, for so negligently keeping the records that one of them was lost; and, remarks his lordship, had this officer been the steward of a manor, who had lost one of his lord's rolls, an action would have lain against him; but, the duty of this officer concerning the public, the negligence or default, was matter for an information.

2ndly. Another principle is this: where there is a breach of trust, a fraud, or imposition in a matter concerning the public which, as between subject and subject,

would only be actionable; yet, as it concerns the Crown and the public, it is indictable; and in accordance with this proposition, it has been held (*t*) that a man who collects anything *pro bono publico*, if he does not apply it accordingly, may be indicted; and again, that “if a man be made an officer (*i.e.* official) by Act of Parliament, and misbehave himself in his office, he is indictable for it at Common Law, and any public officer is indictable for misbehaviour in his office (*u*).” So in the case of Bembridge, the defendant was convicted of, and punished for a misdemeanour.

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(*t*) Rolle R. fo. 2.

(*u*) 6 Mod. 96; Bacon, Abr. tit.

“Office and Officer,” N.’; Stephen,
Dig. Crim. Law, Arts. 118—122.

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(5 Vict. A.D. 1841.)

LIABILITY OF THE GOVERNOR OF A DEPENDENCY.

An action of debt is maintainable in the Court of First Instance in the island of Trinidad against the Governor of the island.

This case came on appeal from the Court of First Instance of Civil Jurisdiction, of Trinidad, before the Judicial Committee of the Privy Council, the facts being as under :—

The appellant, Sir George Fitzgerald Hill, on the 10th of November, 1825, became bound by his writing obligatory to Philip Rundell, and others, of the City of London, jewellers, and co-partners, in the sum of 825*l.* 13*s.* Irish money.

The appellant, some time after giving the said bond, became Lieut.-Governor of the island of Trinidad.

On the 24th of June, 1837, the respondents, the surviving partners, brought their action in the Court of First Instance of Civil Jurisdiction of Trinidad, for the recovery of the above debt.

On the 13th of July, 1837, the appellant came into Court under protest, and pleaded that the said Court ought not to hear or take further cognizance of the action, because, at the time of the commencement of the said action, he was, and still continued, Lieutenant-Governor of the Island of Trinidad, and that he was therefore not liable to be sued in the said Court.

The respondents demurred to the plea, and prayed judgment. On the 17th of November, 1837, the cause was tried, and the Court, after hearing counsel in support of and against the exception, on the 20th of the same month, ordered judgment to be entered up in favour

of the respondents for the amount of the debt, with interest, and costs. From this judgment the present appeal was brought.

Burge, Q.C., and Dr. Addams, for the appellant.

The appellant being Lieutenant-Governor of the Colony, is exempted from being called on for liabilities in the colony over which he is placed. By the terms of his commission, he is vested with the legislative as well as the executive power (*r*) ; his exemption cannot, therefore, be merely personal, as from arrest, but is much higher ; he is not within the jurisdiction of the courts ; they are incompetent to entertain a suit, or to pronounce judgment therein against him.

This privilege is not one merely of municipal law, but is founded on a higher title, viz., the law of nations. Thus Puffendorff (*s*) says, if the subject be aggrieved by a Sovereign, he cannot maintain an action, or oblige him to redress : he may persuade him if he can. The same position is laid down by Locke (*t*), who observes, it is better a private mischief should ensue to an individual, than that the peace and security of government should be violated by an attack upon the magistrate exercising the power of state ; and by the law of this country, if redress is sought for an injury committed by the Crown, it must be, if there is any redress, by petition of right (*u*).

The stat. 11 & 12 Will. 3, c. 12, made to punish governors of plantations, for crimes committed by them in such plantations, recites that a due punishment is not provided for such offences, and that governors, &c., have taken advantage thereof, “not deeming themselves punishable for the same here, nor accountable for such their crimes and offences to any person within their respective governments

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appellant.

(*r*) Stokes, Brit. Colonies, pp. 150, 154, 187.

(*t*) Essay on Government, Part II. s. 205.

(*s*) Lib. 7, c. 6, s. 2. Lib. 8, c. 10, s. 6.

(*u*) 3 Bla. Com. pp. 254–5.

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and commands." Now if there was no jurisdiction against a governor in criminal matters, before the statute, *à fortiori*, none could have existed in civil cases, and the statute is confined to criminal offences only.

The authority of the Governor of Trinidad is derived from a proclamation of the 19th of June, 1813 (*x*), by which all the powers of the executive government within the island are vested solely in the governor for the time being; and all such judicial powers as, previous to the surrender of the island, were exercised by the Spanish governors, are to be exercised by the governor then appointed. This includes the authority and jurisdiction of the Court of Audiencia. By the constitution of the colony under the Spanish Government, the Court of Audiencia had original, civil, and criminal jurisdiction over all the inhabitants of the island (*y*), so that the governor is, by the proclamation of June, 1813, invested with like power; can arrest, grant, or repeal the writ of *habeas corpus*, try actions, and do all such acts as belong to the supreme authority, acting judicially as well as executively. Now, is this consistent with his being liable to be sued in an action of debt? The doctrine of the inviolability of a governor is derived from the Civil Law; it is expressly provided for—*In jus vocari non oportet, neque consulem, neque præfectum, neque prætorem, neque proconsulem, neque ceteros magistratus, qui imperium habent, qui et coercere aliquem possunt, et jubere in carcerem duci*; (*z*), and has been adopted by the Spanish law (*a*), which is the authority in Trinidad.

In *Fabrigas v. Mostyn* (*b*), Lord Mansfield, C. J., assigning the grounds of his judgment, says:—"Now in this case no other jurisdiction is shown even by way of

(*x*) West Ind. Com. Trinidad, App.
p. 176; 1 Howard, Col. L. 531.

(*a*) 1 White, New Recopilacion,
372.

(*y*) West Ind. Com. Trinidad, p.
18.

(*b*) 1 Cowp. 161; S. C. 20 St. Tr
81; 1 Smith L. C. 652, 8th ed.

(*z*) Dig. lib. 2. tit. 4, s. 2.

argument: and it is most certain that if the king's court cannot hold plea in such a case, there is no other court upon earth that can do it, for it is truly said that the governor is in the nature of a viceroy, and of necessity part of the privileges of the king are communicated to him during the time of his government. No criminal prosecution lies against him, and no civil action will lie against him: because, what would the consequence be? Why, if a civil action lies against him, and a judgment is obtained for damages, he might be taken up and put in prison on a *capias*; and therefore locally, during the time of his government, the Courts in the island cannot hold plea against him." That was an action brought in England against a Governor of Minorca for trespass and false imprisonment, and the very circumstance of its being held to lie in the Courts here, clearly shows that it could not be brought in the Courts there—the argument of the Lord Chief Justice is conclusive. In *Tandy v. Earl of Westmoreland* (c), an action was brought against the defendant for an act done by him as Lord-Lieutenant of Ireland, and the subpœna after solemn argument was quashed. The action was brought in Ireland, and Lord Fitzgibbon, C. B., was clearly of opinion that no such action lay, and gave judgment accordingly. The point has been expressly decided in Canada in *Harvey v. Lord Aylmer* (d): there an action of debt was brought against the defendant by a servant; the claim being for wages, and damages for the non-payment thereof. The defendant pleaded that he was governor of the province of Lower Canada, and averred that so long as he continued to execute the said office and trust, no suit nor action could be had or maintained against him in any of his Majesty's courts within the province, for any matter or thing whatsoever; and the Court allowed the exception,

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(c) 27 St. Tr. 1246.

Lower Canada, 542.

(d) 1 Stuart, Cases in K. B. in

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and dismissed the action. The Court were of opinion that the case of *Fabrigas v. Mostyn* was alone sufficient to determine the question, but they cited all the authorities, and stated two cases of a similar nature, which had already been decided in the Upper Province of the country. The inconvenience of the rule forms no argument against it: the subject cannot be said to be without remedy, for he may petition for the governor's removal, and the Crown might put him on terms to do justice if it thought fit—the inconvenience is only similar to the case here of the will of the Sovereign; there is no law prohibiting the king from making a testamentary disposition of his property, but there is no Court capable of administering such property, or of granting probate of such a will; that is a practical hardship both upon the Sovereign and the parties who would be beneficially entitled (e).

Erle, Q.C., and Merivale, for the respondents.

Argument
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The proposition contended for by the appellant is neither consistent with the law of England nor the law of Spain, which is in some measure the rule by which this case must be governed. The protection sought, would give impunity to every governor of a colony for any act committed by him in the colony over which he is set; and release him from every contract or civil obligation. This exemption from the responsibilities of an ordinary citizen is founded on a supposed identity of the office of Governor and that of Sovereign. But the privilege claimed would be even then too high, for the Sovereign has no such extravagant prerogative, and there is no real analogy between the two offices.

The authority of a governor is derived from the Crown; it is delegated, and not inherent, and is defined by the commission and instructions. By the usual form of the

(e) 1 Adlams, 255; *Re Goods of George III.*, 32 L. J. P. M. & A. 15; S. C. 3 Sw. & Tr. 199.

commission (*f*), the governor is captain-general of the forces by sea and land within his province; he is one of the constituent parts of the General Assembly of his province; he has the custody of the great seal, with the same power as the Lord Chancellor of England; he is the ordinary within his province, and presides in the Court of Error, of which he and the council are judges, and he is vice-admiral within his province, but does not sit in the Court of Vice-Admiralty, there being a judge of that court. The instructions formerly issued to the governor of Trinidad are to be found in the memorable trial of General Picton (*g*) for a misdemeanor, in which the question turned upon the legality of the application of the torture by the law of Spain, and the liability of the governor for applying it. The case was thrice argued upon the special verdict, but no decision was pronounced by the Court. There is, however, nothing throughout these lengthened proceedings to give colour to the supposition that he could not be proceeded against, because he was viceroy of the colony—no such ground was taken: the sole question was, whether it was a judicial act, and if so, whether the act done was according to the laws of Spain. The powers of captains-general, governors or viceroys in Spain, are derived from *cedulas* (royal provisions) or instructions, as in this country (*h*), and no such privilege as that contended for here, is to be found in the books containing either the instructions or the laws relating to them. On the contrary, by the *Recopilacion de leyes* (*i*) it is provided that those who shall think themselves aggrieved by the acts of the viceroy, or president, may appeal to the Audience, that is, the Royal Tribunal, and neither shall such viceroy prevent such appeals, or be present at them (*k*).

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(*f*) Stokes, British Colonies, 150. 367—372.

(*g*) 30 St. Tr. 225, 500.

(*i*) Lib. II., tit. 15, 35.

(*h*) 1 White, New Recopilacion,

(*k*) 2 White, New Recopilacion, 31.

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The stat. 11 & 12 Will. 3, c. 12, is a declaratory Act. The preamble recites that the governors, &c., “not deeming themselves liable”—that is no declaration that they were not liable; but the enacting part clearly shews the object of the Act, which was to enable parties to proceed in the Court of King’s Bench here for offences committed in the colonies, and is analogous to the provisions of the Piracy Acts for offences committed on the high seas. The absence of any provision in that Act against civil injuries is a strong inference that governors were amenable for such before the Act. *Lord Bellamont’s Case* (l), *Comyn v. Sabine* (m) and *Fabrigas v. Mostyn*, all shew such liability to attach to the office of governor. *Harvey v. Lord Aylmer* is no authority here; it proceeded upon a misapprehension of the case of *Fabrigas v. Mostyn*. In *Tandy v. Earl of Westmoreland*, the act complained of was a political act, and for such, a governor or viceroy would not be liable any more than a judge for a judicial act (n); but that is not this case: the question here is whether the appellant can screen himself from an action upon his bond on the plea that he is governor of the colony in which the action is brought? He may be free from arrest: that is the common case of members of parliament, ambassadors, servants, soldiers, and others engaged in the service of the Sovereign or that of the State (o): but though such persons have freedom from arrest, can it be argued that their property is not liable? that judgment may not be had or execution issued against their goods and chattels, or even their lands? What reason is there against a similar rule here? There is, however, no pretence for presuming such exemption, for by the law of Trinidad there is no power of arrest before judgment; and, after judgment, execution operates

(l) 2 Salk. 625.

(m) Cited 1 Cowp. 169, 175.

(n) *Post*.

(o) T. Raym. 152; 3 Bla. Com. 289.

against both personal and real property before the person can be attached (*p*). With respect to the practice of the civil law, the passages quoted from the Digest must be taken with great limitation. The officers, under the Roman law, nearest answering to our governors of colonies, were the presidents or *præsides*, who were sent into the provinces directly under the control of the Emperor (*q*), and though they could not be sued in any court of law, if they were vested with jurisdiction, and had a coercive and punitive power during the time of their office, yet at its expiration they might (*r*), and were obliged to remain fifty days in the cities or provinces over which they presided, after the expiration of their office, to enable the provincials to prefer any claim or complaints against them. Grotius (*s*) confines the question of the non-liability of kings, to such as are entrusted with legislative power, and distinguishes between the acts done by a person having such authority in his legislative or in his private capacity: in the latter there is no exemption (*t*).

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Lord Brougham, after stating the facts, delivered the opinion of the Court as follows:—

The question raised in this case is, whether an action will lie against the governor of a colony, in the courts of that colony, while he is such governor, for a cause of action wholly unconnected with his official capacity, and accruing out of the colony before his government commenced?—and this question appears to be one, whatever may be its importance, of no great difficulty.

It may safely be affirmed that they who maintain the exemption of any person from the law, by which all the king's subjects are bound, or, what is the same thing, from the jurisdiction of the courts which administer that

(*p*) Trin. Com. Rep. 12, 16, 62, 91.

(*q*) Dig. lib. 1, tit. 18, §§ 1 & 6.

(*r*) Dig. lib. 5, tit. 1, § 48.

(*s*) Grot. lib. 2, c. 14, § 1.

(*t*) 2 Rutherf. Inst. 263—4.

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law to all besides, are bound to show some reason or authority, leaving no doubt upon the point.

The reference to analogies, or the supposition of inconvenient consequences, must be much more pregnant than any that can be urged in this case, to support or even to countenance such claim. If it be said that the governor of a colony is *quasi* sovereign, the answer is, that he does not even represent the Sovereign generally, having only the functions delegated to him by the terms of his commission, and being only the officer to execute the specific powers with which that commission clothes him :—" The governor," said De Grey, C. J., in *L'abrigas v. Mostyn*, " is the king's servant : his commission is from him, and he is to execute the powers he is invested with under that commission ; which is to execute the laws of Minorca, under such instructions as the king shall make in council." It is proper to observe, that this was the case of the governor of a province once belonging to the crown of Spain, as Trinidad formerly did ; and that one of the arguments of the defendant put his claim upon the highest ground, namely, that he was by the Spanish law and constitution absolute within a district at least of his government, having "supreme power vested in him, and being only accountable to God." Again this Court, in *Cameron v. Kyte (u)*, when a claim to represent the Sovereign and hold the royal power by delegation was set up, refused to allow it, and considered him as only an officer with a limited authority. Their lordships, in deciding that case referred to a *dictum* of Sir William Scott (*x*), that a naval commander may be reasonably supposed to carry with him such a portion of the sovereign authority as shall be necessary to provide for the exigencies of the service. But they said that this observation is plainly applicable only to the case of a commander carrying on war in a remote quarter, and the authority necessarily incident to that

(u) 3 Knapp, P. C. C. 332. (x) *The Rolla*, 6 Robinson, Adm. R. 364.

situation, and can have no application to the case of a colonial governor. Nor must we forget, in reference to the position of the supreme power in the State, that by our law and constitution it is not in the Sovereign, but in the parliament, the Sovereign himself being liable to be sued, though in a particular manner; and if his liability be such, even as much restricted as some have occasionally maintained, it would still be greater than the appellant's argument supposes the liability of a governor to be.

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The consequences imagined to follow from holding the governors liable to action like their fellow subjects are incorrectly stated, and, if true, would not decide the question. For it by no means follows that because an action may be maintained and judgment recovered, therefore the same process must issue against the governor as against another person, pending his government. His being liable to be taken in execution is not the necessary consequence of his being liable to have a judgment against him. There were anciently more instances than happily now, of persons privileged from legal process; but there still are some such exemptions, as privilege of peerage and of parliament, and of persons in attendance upon the Sovereign, and upon courts of justice. None of these privileges protect from suits, all more or less protect from personal arrest in execution, or judgment recovered by suit. Indeed the old, and we may now say obsolete writ of protection, which the king granted to his servants and debtors, purported to be a protection from all pleas and suits; yet the courts held that no one should thereby be delayed in his action, but only that execution should be stayed after judgment (*y*). It may be observed in passing, that those protections were a provision made by the old law for the security of persons in the foreign service of the Crown: as commanders of armies, ambassadors, and doubtless governors of the continental

(*y*) Cro. Jac. 477; 25 Edw. 3, st. 5, c. 19.

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dominions also (z). It therefore is not at all necessary that in holding a governor liable to be sued, we should hold his person liable to arrest while on service—that is, while resident in his government. It is not even necessary that we should meet the suggestion of his goods in all circumstances being liable to be taken in execution—though that is subject to a different consideration.

Next: Suppose all these alleged consequences had been accurately stated, they would not necessarily decide the question: many cases might be put, of as great inconvenience, and even of as great violence done to public feeling, and as great mischief to the public service, by the execution of legal process, as any in the cases that have been put. Yet in none of these circumstances can it for a moment be pretended that the law is not to take its course. The inconvenience which would result from a general officer or an ambassador being taken in execution, on the eve of his departure on service abroad, or the mischiefs that would ensue to the administration of justice from a judge being taken in execution almost at any time, are quite undeniable; but equally certain it is, that these inconveniences offer no argument whatever against the unquestionable liability of all those functionaries to undergo, like the rest of the king's subjects, the process of the law.

Indeed, it is manifest that if these alleged consequences prove anything, they prove too much; they go to set up an exemption from suit in the courts of this country during the continuance of the governor's functions. For nothing that happens to him within the limits of his own government could be much more injurious to his authority than his being outlawed in the Courts of Westminster, or having judgments against him there; supposing he prevented the outlawry by appearing to the action.

Then, is there any authority of decided cases for the

(z) Co. Litt. 130, a.

position in question? It is unnecessary to say anything of *Tandy v. Earl of Westmoreland*, because the question there arose upon an act of the Lord-Lieutenant in his capacity of governor, and because there would be no safety in relying upon the report of the case (a); it ascribes *dicta* to the Court, which there is every reason to suppose must be inaccurately reported, *dicta* in some of which it is impossible to concur.

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The case of *Fabrigas v. Mostyn*, when it came by error into the King's Bench, furnishes the only thing like authority for the contention of those who seek to impeach the judgment under review, and it is not pretended that the decision is upon the point now in question. An action of trespass and false imprisonment having been brought against the Governor of Minorca, he pleaded first the general issue, and then a justification: that he had, as governor, and in the discharge of his duty, imprisoned and removed plaintiff, to prevent and put down a riot and mutiny in which he was engaged. To this special plea there was a replication *de injuriâ* (b), and both issues were found for plaintiff, whereupon the defendant having tendered a bill of exceptions on the ground that the learned judge who tried the cause ought to have directed the jury to find for the defendant, because he had acted as Governor of Minorca, and was not liable to be sued in the courts of England for acts done in Minorca, a writ of error was brought in B. R., and the Court gave judgment for the defendant in error (plaintiff below), holding it quite clear that an action will lie, and that the learned judge did right in not directing the jury as required by the defendant. There having been no evidence to support the plea of justification, there could be no objection taken to the finding of the jury, and a motion for a new

(a) As to this passage, however, 648.

see the judgment of Monahan, C. J.,
in *Luby v. Lord Wodehouse*, *post*, p.

(b) *Ante*, p. 525, n. (d).

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trial in the Common Pleas had been refused, whether made against the verdict or against the judge's direction does not distinctly appear. Nor indeed is it quite clear from the report, in which way the governor's counsel really meant to shape their case; and this, though three elaborate arguments had been held, is observed upon by the Court in passing the judgment.

This much, however, is quite certain—that the decision is not against the liability of Governor Mostyn, to be sued in the island during his government, even for acts of state done by him, much less for a private debt—contracted in his individual capacity, before his government commenced. It is only a decision that he was liable to be sued in England for personal wrongs done by him while Governor of Minorca.

Nor does the decision thus given rest upon any doctrine denying his liability to be sued in the island. There is no doubt a *dictum* of Lord Mansfield in giving the judgment,—that “the governor is in the nature of a viceroy, and that therefore locally during his government no civil or criminal action will lie against him.” And the reason, and the only reason, given for this position is, because upon process he would be subject to imprisonment. With the most profound respect for the authority of that illustrious judge it must be observed, that, as has been shewn, the governor being liable to process during his government, would not of any necessity follow from his being liable to action, and that the same argument might be used to shew that an action lies not against persons enjoying undoubted freedom from arrest by reason of privilege. But the decision in the case does not rest on this *dictum*: on the contrary, Lord Mansfield goes on to say that another reason of a different kind “would alone be decisive,” and indeed the *dictum* itself is introduced as if the question had arisen upon a plea in abatement to the jurisdiction—whereas it arose not on the pleadings at all, as his lordship more than once remarked. Nothing

can be more clear than, the action being of a transitory nature, its being maintainable in Minorca would not have prevented it from lying in England also. It is a possibility that the expressions used may have been somewhat altered in the report. It certainly represents Lord Mansfield (c) to have treated the manner in which the Privy Council deals with colonial law, as a similar case to that of courts having to examine questions of foreign law, which is proved as matter of fact. But, supposing the report is quite accurate in all respects, the decision in no way supports the contention of the appellant.

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A case was decided in parliament at the end of Charles II.'s reign—*Dutton v. Howell* (d)—which Governor Mostyn's counsel relied much upon, and in which the judgment of all the judges (for it had been brought from the Exchequer Chamber and King's Bench) was reversed, and a governor held not liable to be sued in England, for imprisoning a person guilty of official delinquency under his government. It is quite clear that this case afforded no precedent for Governor Mostyn, much less for the defence to the present action. It went on the ground of the governor and his council having acted judicially (e); and though the counsel for the plaintiff in error before the House of Lords urged, among other things, that governors of Scotland and Ireland could not be sued, so did they also contend, that it would be equally dangerous to sue Privy Councillors, a position probably as much disregarded by the House of Lords, who reversed the judgment, as it certainly had been, with the other arguments of the same caste, by the judges of the three courts who had pronounced it.

It is unnecessary to say anything respecting the statutory provision of 11 & 12 Will. 3, c. 12, which in one view makes rather more against the appellant than it

(c) Cowp. 174.

(d) Show. P. C. 24.

(e) See note to *Kemp v. Neville*,
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does for him, nor respecting the alleged judicial powers of the Governor of Trinidad, as he appears not to stand in the situation which has been supposed. It cannot be alleged that the process runs in his name; and even if he were (which he is not) the Court of Error, that would not decide that he cannot be sued. The judges of courts in this country, which have the most unquestionable jurisdiction in certain actions, are themselves liable to be sued in such courts; and cases might easily be figured, in which great difficulty would arise how to try suits brought against them in consequence of their official position: but the possibility of such difficulties, whatever legislative enactments it might give rise to upon its nearer approach, can never surely be urged as a reason for denying what all men know to be the law, namely, that those parties are liable to be sued.

The judgment appealed from must, therefore, be affirmed with costs.

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It is now clearly established that the governor of a dependency is liable both civilly and criminally for his conduct in such government.

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As regards his liability civilly, an action was, in an old case (*f*), held to lie against the President of Calcutta for procuring a foreign prince to imprison the plaintiff; and in *Macbeath v. Haldimand* (*g*), hereafter mentioned (*h*), it was not contended that the position of defendant as Governor of Quebec afforded him immunity.

Fabrigas v.
Mostyn.

A most important reported case respecting the subject now under consideration is *Fabrigas v. Mostyn* (*i*)

(*f*) *Rafael v. Verelst*, 2 W. Bla. 983, 1055.

(*g*) 1 T. R. 172.

(*h*) See note to *Sutton v. John-*

stone, *post*.

(*i*) 20 St. Tr. 81; S.C. Cowper, 161; 1 Smith L. C. (8th ed.) 652.

(A.D. 1773). The plaintiff in this case was a native of, and resident in, Minorca, and the defendant was governor of that island. During the period of his government the defendant caused the plaintiff to be seized, kept in close confinement for six days, and afterwards banished (being put on board ship and taken to Carthage in Spain) for twelve months. The defendant justified his conduct by pleading that the plaintiff was unlawfully endeavouring to raise up a mutiny and sedition in the island, which compelled him (the defendant) to imprison and banish the plaintiff.

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The jury found a verdict for the plaintiff, and expressly stated that he had not been guilty of mutiny or sedition, and had not acted in any way tending thereto.

The case was afterwards taken into Error, where it was contended that the Court had no jurisdiction to try the cause, upon grounds which will sufficiently appear from the following abridgment of Lord Mansfield's judgment :

This, observed his lordship, was an action for an assault and false imprisonment by the defendant upon the plaintiff. To the declaration the defendant put in two pleas : 1st, Not Guilty ; and 2ndly, that he was Governor of Minorca, by letters patent from the Crown, and that the plaintiff was raising sedition and mutiny ; in consequence of which he did imprison him and send him out of the island, which he alleges he had an authority to do, for that sedition and mutiny that he then was raising. To this plea the plaintiff does not demur, nor does he deny that it would be a justification, in case it was true ; but he denies the truth of the fact, and puts in issue whether the fact of the plea was true.

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The judge left it to the jury upon the facts of the case ;

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and they found for the plaintiff. The defendant then tendered a bill of exceptions, upon which bill of exceptions it comes before us. And the great difficulty I have had upon both these arguments is, to be able clearly to comprehend what question it is that is meant seriously to be brought before the court for their judgment. If I understand the counsel for Governor Mostyn right, what they say is this: the plea of Not Guilty is totally immaterial, and the plea of justification is totally immaterial, for it appears on the plaintiff's own shewing that this matter arose in Minorca; and the replication to the plea admits it: and it likewise appears that the defendant was Governor of Minorca; and as the imprisonment arose in Minorca by the authority of the defendant, the judge ought to have stopped all evidence whatsoever, and have directed the jury immediately to have found for the defendant. Why? There are three reasons given. One of them insisted upon in the first argument (but abandoned to-day) is, that the plaintiff is a Minorquin, born in the island of Minorca. To dispose of that objection at once, I shall only say that it is wisely abandoned to-day. A Minorquin; what then? Has not a subject of the king, born at Minorca, as good a right to apply to the king's court of justice, as a person born within the sound of Bow-bell, in Cheapside? If there is no other objection to him, would that make any? To be sure not. But it is abandoned, so I shall lay it out of the case.

The two grounds which are enforced to-day are, if I take them right, 1st, that the defendant was Governor of Minorca, and therefore for no injury whatsoever that is done by him, right or wrong, can any evidence be heard, and that no action can lie against him; 2ndly, that the

injury was done out of the realm. I think these are the whole amount of the questions that have been laid before the Court. Now as to the first, there is nothing so clear as that in an action of this kind, which is for an assault and false imprisonment, the defendant, if he has any justification, must plead it; and there is nothing more clear than that, if the Court has not a general jurisdiction of the matter, he must plead to that jurisdiction, and he cannot take advantage of it upon the general issue.

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The point that I shall begin with is the sacredness of the person of the governor. Why, if that was true, and if the law was so, he must plead it. This is an action of false imprisonment: *primâ facie*, the Court has jurisdiction. If he was guilty of the fact, he must shew a special matter that he did this by a proper authority. What is his proper authority? The king's commission to make him governor. Why, then he certainly must plead it: but, however, I will not rest the answer upon that. It has been singled out, that in a colony that is beyond the seas, but part of the dominions of the Crown of England, though actions would lie for injuries committed by other persons, yet it shall not lie against the governor. Now I say, for many reasons, if it did not lie against any other man, it shall most emphatically lie against the governor. In every plea to the jurisdiction, you must state a jurisdiction; for if there is no other method of trial, that alone will give the king's courts jurisdiction. Now in this case no other jurisdiction is shewn, even by way of argument; and it is most certain, that if the king's courts cannot hold plea in such a case, there is no other court upon earth than can do it: for it is truly said, that a governor is in the nature of a vice-

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roy (*k*), and, of necessity, part of the privileges of the king are communicated to him during the time of his government. No criminal prosecution lies against him, and no civil action will lie against him; because, what would the consequence be? Why, if a civil action lies against him, and a judgment is obtained for damages, he might be taken up and put in prison on a *capias*; and therefore, locally, during the time of his government, the courts in the island cannot hold plea against him. If he is out of the government, he leaves it; he comes and lives in England, and he has no effects there to be attached: then there is no remedy whatsoever, if it is not in the king's courts. But there is another very strong reason, which would alone be decisive. This is a charge against him, which, though a civil injury, has a mixture of criminality in it: it is an assault; which is criminal by the laws of England, and is an abuse of that authority given him by the king's letters patent under the great seal. If by the authority of that capacity in which he stood he has done right, he is to lay that before the Court by a proper plea, and the Court will exercise their judgment whether that is not a sufficient justification. In this case, if the justification had been proved, perhaps the Court would have been of an opinion that it was a sufficient answer, and he might have moved in arrest of judgment afterwards, and taken the opinion of the Court; but the Court must be of opinion that it is a sufficient answer, and that the raising a mutiny in a garrison, though in time of peace, was a reason for that summary proceeding, in taking him up and sending him out of the island. I could conceive cases in time of war, in which

(*k*) This proposition is untenable; *ante*, p. 630; *post*, pp. 644, 645.

a governor would be justified, though he acted very arbitrarily, in which he could not be justified in time of peace (l).

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There may be some cases arising abroad, which may not be fit to be tried here ; but that cannot be the case of a governor injuring a man, contrary to the duty of his office, and in violation of the trust reposed in him by the king's commission. And therefore, in every light in which I see this matter, it holds emphatically in the case of a governor, if it did not hold in respect of any other man within the colony, province, or garrison. But to make questions upon matters of settled law, where there have been a number of actions determined, which it never entered into a man's head to dispute—to lay down in an English court of justice such monstrous propositions as that a governor, acting by virtue of letters patent under the great seal, can do what he pleases ; that he is accountable only to God and his own conscience—and to maintain here that every governor in every place can act absolutely ; that he may spoil, plunder, affect their bodies and their liberty, and is accountable to nobody—is a doctrine not to be maintained ; for if he is not accountable in this court, he is accountable nowhere. The king in council has no jurisdiction of this matter ; they cannot do it in any shape ; they cannot give damages, they cannot give reparation, they cannot punish, they cannot hold plea in any way. Wherever complaints have been before the king in council, it has been with a view to remove the governor ; it has been with a view to take the commission from him which he held at the pleasure of the

(l) With regard to the argument of necessity, here put forward, see *post*, p. 652, and note to *Sutton v. Johnstone, post, ad finem*.

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Crown. But suppose he holds nothing of the Crown, suppose his government is at an end, and that he is in England, they have no jurisdiction to make reparation to the party injured; they have no jurisdiction to punish in any shape the man that has committed the injury: how can the argument be supported, that, in an empire so extended as this, every governor in every colony and every province belonging to the Crown of Great Britain, shall be absolutely despotic, and can no more be called in question than the king of France? and this after there have been multitudes of actions in all our memories against governors, and nobody has been ingenious enough to whisper them, that they were not amenable.

In a case in *Salkeld* (*m*), there was a motion for a trial at bar in an action of false imprisonment against the Governor of New York; and it was desired to be a trial at bar, because the Attorney-General was to defend it on the part of the king, who had taken up the defence of the governor. That case plainly shows that such an action existed; the Attorney-General had no idea of a governor being above the law. Powell, J., says, in the case of *Way v. Yally* (*n*), that an action of false imprisonment had been brought here against the Governor of Jamaica for an imprisonment there: and the laws of the country were given in evidence. The Governor of Jamaica in that case never thought that he was not amenable. He defended himself. He showed, I suppose, by the laws of the country, an act of the assembly which justified that imprisonment; and the Court received it, to be sure, as they ought to do. Whatever is a justification in the

(*m*) *Lord Bellamont's Case*, 2 Salk.
625.

(*n*) 6 Mod. 194.

place where the thing is done, ought to be a justification where the case is tried. I remember an action against Governor Sabine, and he was very ably defended. Nobody thought the action did not lie against him. He was Governor of Gibraltar, and he barely confirmed the sentence of a court-martial, which tried one of the train of artillery by martial law. Governor Sabine affirmed the sentence. This plaintiff was a carpenter in the train. It was proved at the trial, that the tradesmen that followed the train were not liable to martial law; the Court were of that opinion; and therefore the defendant was guilty of a trespass in having a share in that sentence which punished him by whipping.

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The rest of Lord Mansfield's well-known judgment in *Fabrigas v. Mostyn*, has reference to the question of venue, and upholds the doctrine, since clearly established, that an action is maintainable here for an assault committed abroad (o).

Though the main point decided in *Fabrigas v. Mostyn* was unquestionably well decided, yet, viewed by the light of subsequent decisions, some of the remarks there attributed to Lord Mansfield cannot be accepted as correct. The comparisons of the functions of a governor with those of the Sovereign attempted to be drawn would seem to be fallacious, not only from the judgment delivered by Lord Brougham in the Principal Case (p); but also from *Cameron v. Kyte* (q), and *Musgrave v. Pulido* (r). In the first of these cases a question arose as to the validity of

(o) The whole question of *venue* in transitory actions (whether arising from proceedings in England or abroad) is discussed at length in the note to *Mostyn v. Fabrigas*, 1 Smith, L. C. 8th ed., pp. 657 *et seq.* Local *venue*

was abolished by the Judicature Acts and Rules, 1873 and 1875.

(p) *Ante*, p. 630.

(q) 3 Knapp, P. C. C. 332.

(r) 5 App. Ca. 102; 49 L. J., P. C. 20.

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an act of the Governor of Berbice, and it was held that the governor of a colony has not by virtue of his appointment the sovereign authority delegated to him; that an act done by him, unauthorized either by his commission, or expressly or impliedly by his instructions, is not equivalent to such an act done by the Crown itself; and is consequently invalid. "If," said Parke, B., delivering the judgment of the Privy Council, "a governor had by virtue of that appointment, the whole sovereignty of the colony delegated to him as a viceroy, and represented the king in the government of that colony, there would be good reason to contend that an act of sovereignty done by him would be valid and obligatory upon the subject living within his government, provided the act would be valid if done by the Sovereign himself, though such act might not be in conformity with the instructions which the governor had received for the regulation of his own conduct. The breach of those instructions might well be contended, on this supposition, to be matter resting between the Sovereign and his deputy rendering the latter liable to censure or punishment, but not affecting the validity of the act done. But if the governor be an officer merely with a limited authority from the Crown, his assumption of an act of sovereign power, out of the limits of the power so given to him, would be finally void, and the courts of the colony over which he presided could not give it any legal effect. We think the office of governor is of the latter description, for no authority or *dictum* has been cited before us to show that a governor can be considered as having a delegation of the whole royal power in any colony, as between him and the subject, when it is not expressly given him by his commission. And we are not aware that any com-

mission to colonial governors conveys such an extensive authority."

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The more recent case of *Musgrave v. Pulido* (s), was an action of trespass for seizing and detaining a schooner of which the plaintiff was charterer, and which had put into the port of Kingston, in Jamaica, for repairs. The defendant pleaded that he was Captain-General and Governor-in-Chief of the Island of Jamaica and its dependencies, and was as such entitled to the privileges and exemptions appertaining to such office and to the holder thereof, and that the acts complained of were done by him as governor of the said island of Jamaica, and in the exercise of his reasonable discretion as such, and as acts of State. To this plea the plaintiff demurred, and the Supreme Court of Jamaica allowed the demurrer. Sir Montagu Smith, delivering the judgment of the Privy Council on appeal from the judgment of the Supreme Court, after pointing out that the plea was advisedly pleaded as one of privilege with the object of raising the question of the immunity of the appellant as governor from being impleaded and compelled to answer in the courts of the colony, said: "The defendant has sought to strengthen his claim of privilege by averring that the acts complained of were done by him 'as Governor' and as 'acts of State.' . . . It is apparent from the authorities that the governor of a colony (in ordinary cases) cannot be regarded as a Viceroy; nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission, and limited to the powers thereby expressly or impliedly entrusted to him. Let it be granted that, for acts of power done by a

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governor under and within the limits of his commission, he is protected, because in doing them he is the servant of the Crown, and is exercising its sovereign authority ; like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the governor may assume to do them as governor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of State. When questions of this kind arise it must necessarily be within the province of municipal courts to determine the true character of the acts done by a governor, though it may be that when it is established that the particular act in question is really an act of state policy done under the authority of the Crown, the defence is complete, and the court can take no further cognizance of it." Their lordships however being of opinion that the plea did not sufficiently show any grounds upon which the acts of the governor became acts of State, or that the seizure was an act that he was warranted in doing as governor, advised Her Majesty to affirm the judgment of the court below.

*Phillips v.
Eyre.*

In *Phillips v. Eyre* (t) it was held that a colonial Act of Indemnity, by which the right of action in respect of an act, otherwise unlawfully done by the governor of a colony, is taken away before action brought in England, is a good defence to such an action ; and that the validity of such an Act is not affected by the fact that the governor who joined in passing it was personally interested in the measure. But the fact that such an Act of Indemnity was considered necessary, and was alone relied on as a defence to the action, " raises a strong presumption that

(t) L. R. 4 Q. B. 225 ; Ex. Cha., 6 do. 1, and 40 L. J., Q. B. 28.

it had been thought that the action might, but for such Act, have been maintained" (u).

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Referring to the liability of commissioners appointed in a conquered country, the Court, in *Elphinstone v. Bedreechund* (x), remarked that "a commissioner is at most only equal to a governor; perhaps his office is rather inferior; at any rate, he cannot pretend to a greater degree of irresponsibility."

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Commis-
sioners.

The liability of the Lord Lieutenant of Ireland to be sued in the courts of that country for acts done by him in the supposed discharge of his political duty has been considered on three important occasions (y). For our present purpose a reference to the case of *Luby v. Lord Wodehouse* (z), which arose out of the Fenian conspiracy in the year 1865, may suffice. It was an action against the Lord Lieutenant for an illegal seizure of the plaintiff's property, and came before the Court of Common Pleas in Dublin upon a motion by the Attorney-General that the summons and plaint should be taken off the file. Chief Justice Monahan, after observing that upon the plaintiff's own statements the act complained of was one done by the Lord Lieutenant as Lord Lieutenant, and in the supposed discharge of his duty as such, said, "The next question is, what is the law in relation to such acts? Whether in this country (a) the Lord Lieutenant discharging his

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(u) *Per curiam*, *Musgrave v. Pulido*, L. R. 5 App. Ca. at p. 110.

(x) 1 Knapp. P. C. C. 345.

(y) See *Tandy v. Lord Westmoreland*, 27 St. Tr. 1246; *Luby v. Lord Wodehouse*, 17 Ir. Com. L. Reps. 618; *Sullivan v. Lord Spencer*, 6 Ir. R., C. L. 173.

(z) 17 Ir. Com. L. R. 618.

(a) In reference to the above case

the Privy Council remark in *Musgrave v. Pulido* (5 App. Ca. 112): "The Courts appear to have thought that no action would lie against the Lord Lieutenant in *Ireland*, and, upon the facts brought to their notice, it may well be that no action would have lain against him anywhere."

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high duty as representative of the Queen, if he outsteps his duty in the strict sense, and does an act which, if the same act were done by a police magistrate under a warrant, would not be justifiable in point of law, an action can be taken against him as Lord Lieutenant?" The Chief Justice, after referring to the cases of *Fabrigas v. Mostyn*, *Hill v. Bigge*, and *Tandy v. Lord Westmoreland* (b), then observed that in consequence of a doubt thrown by Lord Brougham upon the accuracy of the report of the last-named case (d), the Court had requested the officer of the Exchequer to furnish them with extracts from the rolls of that Court relating to it, and he had done so. The result was precisely as stated in the report. It is ordered that the subpoena (with which the action commenced) "be quashed, the same having been issued improvidently." "The result is," continued the Chief Justice, "that if an act be done by the Lord Lieutenant in his capacity of Lord Lieutenant, and an action be brought against him, such an action is not maintainable, and that it is a case in which it is the Court's duty to intervene, and to take the proceedings off the file. The question then, is, what course should this Court take upon the present occasion? Should they comply with the motion made by the Attorney-General, or refuse it, leaving it to the Lord-Lieutenant to put a plea upon the file that the act was done by him in his capacity of Lord-Lieutenant? None of us entertain any doubt whatever as to the propriety of the decision in *Tandy v. Lord Westmoreland*. We entertain no doubt whatever that it would be contrary to all law, and contrary to reason, that, while

(b) 27 St. Tr. 1246.

(d) *Ante*, p. 633.

a governor is discharging the high duty he is intrusted with, redress can be obtained through such an action as this. We do not find a single case in which such an action has been maintained at all, or has been brought against a government, except the case just mentioned. We find that, up to the present, although the country has passed through troubled times, no such action has been commenced until that we are now considering. We are of opinion that the law requires the matter to be summarily disposed of, and that it is not to be submitted to a jury in the first instance to say whether the act was done by the defendant as Lord-Lieutenant." The Court therefore, being of opinion, upon the plaintiff's own showing, that the act was an act of State done by the Lord-Lieutenant as Lord-Lieutenant, came to the conclusion that it was their duty to comply with the application of the Attorney-General, and accordingly ordered the writ to be taken off the file.

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As regards the criminal responsibility of the governor of a colony or dependency for an act done by him whilst discharging the functions of his office, attention must be directed to the stat. 11 & 12 Will. 3, c. 12, intituled "An Act to punish Governors of Plantations in this Kingdom for crimes by them committed in the Plantations." The preamble of that statute is remarkable—it recites that a due punishment is not provided for several crimes and offences committed out of this realm of England, whereof divers governors of plantations and colonies have taken advantage, and have committed crimes and offences—not deeming themselves punishable for the same here, nor accountable for such their crimes and offences to any person within their respective governments; and, for remedy thereof, it is enacted that such

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offences shall be tried in the Court of King's Bench in England (c).

The most celebrated cases relating to the criminal liability of the governor of a dependency, are those of General Picton, Governor Wall, and, more recently, that of Governor Eyre.

R. v. Picton.

General Picton (f) was indicted for having, while Governor of Trinidad, illegally inflicted torture on one Luisa Calderon, to compel her to confess a crime of which she was accused. This fact having been proved in evidence, it was argued for the defence, that after Trinidad had been ceded to the English Crown, the pre-existing Spanish law remained in force, and that what the defendant had done was authorised under such law. After much conflicting evidence respecting the Spanish law, and as to how much of that law had applied to Trinidad before its cession to the English, Lord Ellenborough, C. J., in summing up, left to the jury the question whether the application of torture formed part of the law of Trinidad at the time of the cession of that island. They found "there was no such law as this existing at the time of the cession." On which finding a verdict of guilty was recorded.

A rule for a new trial was afterwards moved for, on the grounds that the law of Spain had been misrepresented at the trial, and that the defendant had been acting in a

(c) See also stat. 42 Geo. 3, c. 85, s. 1, which extends the provisions of the Act of William III. to persons in public employment abroad, and enacts that if any person employed in the service of the Crown, in any civil or military station or capacity out of Great Britain, shall commit any in-

dictable offence in the execution of or under colour of his office, he may be prosecuted for the same in the Court of King's Bench. See *R. v. Shawe*, 5 M. & S. 403; *Reg. v. Eyre*, L. R. 3 Q. B. 487.

(f) 30 St. Tr. 225.

judicial capacity at the time when the misdemeanour charged was alleged to have been committed (*g*).

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In showing cause against the rule, it was contended that even if torture had been lawful when Trinidad was ceded, it was nevertheless unlawful so soon as the island became British territory (*h*), by analogy to the principle that a slave becomes free directly he sets foot in this country (*i*).

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The rule was made absolute, Lord Ellenborough saying that this was a case of great importance, and that, if possible, it would be desirable to have a special verdict in order that the question might be argued whether the application of torture could be consistent with the law of Great Britain.

On the second trial the jury found a special verdict setting out the facts of the case, and expressing their inability to decide whether the defendant was guilty or not.

Upon the argument of the special verdict, it was contended by the counsel for the prosecution that the Spanish law authorising torture, could not have continued to exist, as being contrary to the fundamental principles of the British constitution; and citing the statute 11 & 12 Will. 3, c. 12, he argued that this was a strong legislative declaration that every colonial governor was bound to conform himself to the law of this country in the administration of his government, under the penalty of being here responsible for his misbehaviour (*k*).

(*g*) As to the liability of a judge when acting in a judicial capacity, see *Kemp v. Neville*, and the note thereto, *post*.

(*h*) See note to *Calvin's Case*, *ante*, pp. 50, 51.

(*i*) *Sommersett's Case*, *ante*, p. 59.

(*k*) In Hil. Term, 1812, the defendant's recognizances were ordered to be respited till the Court should further order, and after this no other proceedings were taken in the above

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In the case of Governor Wall (*l*), a conviction was had against the accused for murder committed twenty years before the trial, by the infliction of excessive corporal punishment on the deceased, one of the garrison of the island of Goree, of which the defendant was then governor; there being evidence to show that the act of homicide had been malicious. And in this case Chief Baron Macdonald charged the jury precisely as he might have done at an ordinary trial for murder, adding—"when a well-intentioned officer is at a great distance from his native country, having charge of a member of that country, and it shall so happen that circumstances arise which may alarm and disturb the strongest mind, it were not proper that strictness and rigour in forms and in matters of that sort should be required, where you find a real, true, and genuine intention of acting for the best for the sake of the public. You see they are in a situation distant from assistance and from advice; in these circumstances, if a man should be so much thrown off the balance of his understanding, as not to conduct himself with the same care and attention that any one in the county of Middlesex would be required to do, and does not exceed greatly the just and proper line of his duty, allowance for such circumstances ought unquestionably to be given to him. But on the other hand, it is of consequence, that where a commander is so circumstanced—that is, at a distance from his native country, at a distance from inspection,—at a distance from immediate control,—and not many British subjects being there,—if he shall, by reason of that

case, though the prosecution was still pending when General Picton fell at Waterloo. See note at end of the

Report in 30 St. Tr.

(*l*) *R. v. Wall*, 28 St. Tr. 51.

distance, wanton with his authority and his command, it will certainly be the duty of the law to control that, and to keep it within proper bounds. The protection therefore of subjects who are serving their country at that distance, on one hand, is one of the objects you are to have in view to-day: the protection of a well-intentioned officer, if such he be—who does not by his conduct disclose a malevolent mind, but may disclose human infirmity to a certain extent, who, being in trepidation and alarm of mind, overlooks some things he ought otherwise to have regarded,—such a man's case is on the other hand deserving of great attention " (m).

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In times of great disturbance and sudden emergency, such as indicated by Chief Baron Macdonald in the last mentioned case, the governor of a dependency may occasionally be compelled to resort to a proclamation of Martial Law (n), as the only means of suppressing sudden insurrection and resistance to constituted authority. When such a proclamation has been made there is under it a suspension of civil rights (o), and the ordinary forms of trial remain in abeyance, being superseded by such forms as may for the time being be directed by the authority proclaiming Martial Law. But such a course can only be justified on the ground of paramount necessity (p), where the general safety of the colony or dependency urgently requires that prompt and drastic measures should be adopted for the restoration of peace and order (q). If,

(m) See Lord Campbell's opinion as to the injustice of the conviction in this case; 3 Lives of Ch. Just. 149.

(n) Smith De Rep. Ang. ii. c. 4. See Evidence of Sir D. Dundas before the Committee of the House of Commons to enquire into certain transac-

tions in Ceylon, 1849; Stephen's Hist. Cr. L. i., p. 214.

(o) *Inter arma silent leges*; Co. Litt. 249.

(p) See *per* Lord Mansfield, *R. v. Stratton and others*, 21 St. Tr. 1230.

(q) As to the various senses in

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therefore, there be any abuse of such exceptional powers by the persons in whom they are vested, any cruelty or deviation from the principles of humanity, if any acts are done not *bonâ fide* for the suppression of rebellion, but wantonly, maliciously, or with a desire for vengeance, for such acts they will be both criminally and civilly responsible (r).

Reg. v. Eyre.

The principles upon which the criminal liability of a governor placed in such circumstances as above indicated is to be determined were much discussed with reference to the acts of Governor Eyre in suppressing an insurrection in Jamaica in the year 1865 (s). In charging the Grand Jury of Middlesex upon a bill of indictment, presented under the Colonial Governors' Act (t), for various alleged acts of cruelty, in illegally proclaiming and carrying out martial law, and continuing it, as was alleged, after the danger of further insurrection had ceased to exist, Mr. Justice Blackburn (u) said:—"Had he such reasonable grounds as to lead him to think it right to continue it (martial law); or did he continue it in fact to such an excess or degree, and so much more than was necessary, and so far beyond it, that you would say a man exercising reasonable moderation and firmness, which he ought to bring to that purpose, would have known that he should not do it, and must be blamed because he did do it? . . .

which the term "Martial Law" is used, see Stephen's Hist. Cr. L. i., p. 207. As used above it means, "the assumption by the officers of the Crown of absolute power, exercised by military force, for the suppression of an insurrection and the restoration of order and lawful authority." *Id.* p. 215. See also Clode, Mil. and

Martial Law, 137.

(r) *Wright v. Fitzgerald*, 27 St. Tr. 765.

(s) See Finlason's Hist. of the Jamaica Case.

(t) 11 & 12 Will. 3, c. 12.

(u) Rep. of the case of *The Queen v. Eyre*, by W. Finlason, p. 82.

You are to put yourselves in his position, and make all due allowance for his position, not making too much, but all due allowance, and say whether, under those circumstances, he did bring that amount of ordinary firmness, calmness, and moderation to the consideration of the question which he ought to have done; and if he did act honestly in that way, whether his failure to act with the necessary degree of firmness and moderation was to such an extent as to make it a criminal failure; which, as I have already said, is an indefinite phrase, but one that you must bring common sense to bear upon" (x). In this case the grand jury ignored the bill against Governor Eyre (y).

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Not only is a governor, or other person entrusted with the duty of suppressing riot or rebellion, responsible for excess, but a failure of duty will render him similarly liable. In the language of Mr. Justice Littledale (z), such a person "is bound to hit the exact line between excess and failure of duty, and the difficulty of so doing, though it might be some ground for a lenient consideration of his conduct by the jury, is no legal defence." Nor could a party so charged excuse himself on the mere ground of honest intention.

By the above cases the law concerning the liability, civil and criminal, of the governors of our colonies and dependencies appears to be firmly and satisfactorily settled.

(x) Rep. of the case of *The Queen v. Eyre*, p. 99.

(y) A bill for murder was also preferred at the Central Criminal Court against Colonel Nelson and Lieutenant Brand, founded on the part they had taken in suppressing

the insurrection, which was also ignored by the grand jury.

(z) *Reg. v. Pinney*, 3 B. & Ad. 958; see also *Archibald Stewart's Case*, 18 St. Tr. 863; and *per Holroyd, J.*, 2 Stark. N. P. 108.

SUTTON v. JOHNSTONE, 1 T. R. 493 (a).

(24 Geo. 3, A.D. 1784.)

LIABILITY OF OFFICER IN THE SERVICE OF THE CROWN.

The Commander of a squadron who maliciously and without reasonable or probable cause brings before a Court Martial the Captain of a vessel under his orders, for an alleged breach of duty, is not, for so doing, liable to an action at suit of his subordinate.

Declaration. This was an action on the case in which Evelyn Sutton was plaintiff, and George Johnstone defendant. The declaration stated, that whereas, on the 16th of April, 1781, and before, and afterwards, there were open war and hostilities between George III., King of Great Britain, &c., and the French King, his most Catholic Majesty, and the States-General of the United Provinces: And whereas, during such war and hostilities, and before the committing of the grievances hereinafter mentioned, (that is to say,) on the said 16th of April, 1781, a squadron of ships of war, of and belonging to the King, had been sent out and employed under the command of the defendant, as Commander-in-Chief, upon a particular expedition against his Majesty's enemies; and the said squadron, under the said command, had proceeded in the course of such expedition to Port Praya Bay, in the island of Saint Jago, in foreign parts: And whereas the plaintiff, before and on, &c., was captain of one of his said Majesty's ships of war, called the Isis, one of the said squadron, and, as such, under the command of the defendant, as Commander-in-Chief of the said squadron, and which ship was also in the said expedition, to Port Praya Bay, &c.: And whereas, before the committing of the griev-

(a) S. C. 1 Brown, P. C. 76, Dom. Proc. *ib.* 93.

ances hereinafter mentioned, and whilst the said squadron under the said command was in Port Praya Bay, the said squadron was attacked by a squadron of ships and vessels of war, belonging to the French King, under the command of Monsieur Suffrein, in consequence of which an action took place between the said squadrons; in which action the Isis was greatly damaged: And whereas the said squadron belonging to the French King, after such action, sailed away and left his said Majesty's squadron, under the command of the defendant, in the said bay; and the commanders of the said ships of his said Majesty's squadron were thereupon ordered by the defendant, as Commander-in-Chief of the said squadron, to cut or slip their cables, and put to sea after the said squadron belonging to the French King, &c.: And whereas the said squadron under the command of the defendant did put to sea after the said squadron belonging to the French King; and the defendant as such Commander-in-Chief caused the said squadron under his command to be formed in line of battle, and bore down with his said squadron under his command upon the enemy about sunset of the same 16th April, 1781, in order to engage the said enemy, but no further engagement between the said squadrons took place; and the said squadron, under the command of the defendant, returned to Port Praya Bay aforesaid. And although he, the plaintiff, during the whole of the said engagement and pursuit, and bearing down as aforesaid, and during the whole of the said 16th April, 1781, behaved and conducted himself as a gallant, good, loyal, obedient, and faithful captain of the said ship the Isis, and did his duty, as such, to the best of his power, skill, and ability, and the state and condition of the said ship the Isis, and was never guilty of delaying and discouraging the public service on the 16th April, 1781, or at any other time, nor of wilfully disobeying the verbal orders or public signals of the said defendant in any respect, nor of wilfully and improperly

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falling astern, and not keeping up in the line of battle, according to the signal then abroad, after the Isis had joined the squadron, and cleared the wreck of the foretopmast, when he, the defendant, bore down upon the enemy about sunset of the said 16th April, 1781, nor of any other neglect or misbehaviour as captain; yet the defendant, well knowing the premises, but maliciously, injuriously, and wrongfully, contriving, and intending, to hurt the plaintiff in his good name, fame, character, and reputation, as a captain of a ship of war in his Majesty's service, and to cause him to be suspected of cowardice, &c., and to bring him into great disgrace, infamy and contempt with all his Majesty's subjects, and to deprive him of his rank and station of captain and commander of the said ship, and of the profits, advantages, and emoluments thereto belonging; and to subject him to the pains and penalties by law inflicted upon captains of ships of war guilty of cowardice, and other the crimes aforesaid; he, the defendant, so being such Commander-in-Chief as aforesaid, afterwards, to wit, on, &c., at, &c., falsely and maliciously, and without any reasonable or probable cause, charged and accused the plaintiff with having, on the said 16th April, 1781, on the occasions and service aforesaid, committed the crimes and offences hereafter next mentioned (that is to say), disobedience of his, the defendant's, verbal orders, and public signals, in not cutting his, the plaintiff's, cables (meaning the cables of the Isis), and putting to sea after the enemy, as he, the defendant, had directed; and for falling astern after he, the plaintiff, had joined the squadron as aforesaid; and not keeping up in the line of battle, after he had cleared the wreck of the foretopmast, when the defendant made the signal for the line-of-battle abreast, and bore down on the enemy at sunset; by which disobedience and neglect the enemy were enabled to take their disabled ships in tow, to lead the squadron far to leeward of the island of Saint Jago, to draw matters on in

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such a train, that it became impossible to engage them with the whole force of the said squadron before the close of day, whereby an opportunity was lost of improving the victory the said squadron had obtained: and the defendant, as such Commander-in-Chief, afterwards did, under colour and pretence of the said supposed crimes and offences, falsely, maliciously, wrongfully, and injuriously, and without any reasonable or probable cause, put the plaintiff under an arrest and imprisonment, in order that he might be tried by a court-martial for the same supposed crimes and offences; and did also wrongfully, maliciously, and injuriously, and without any reasonable or probable cause, under colour and pretence of the said supposed crimes and offences, suspend and remove him from his said office, post, and rank, of captain of the said ship the Isis, until a court-martial should be held; and maliciously, and without any reasonable or probable cause, sent him, so being under the said arrest, imprisonment, and suspension, unto the East Indies, and from thence to Great Britain, in order to be tried by a court-martial, for the said supposed crimes and offences; and maliciously, and without any reasonable or probable cause, kept, and caused him to be kept, under such arrest, imprisonment, and suspension, for a long space of time, to wit, from the said 22nd of April, 1781, until the 11th December, 1783, and until the time of the trial and acquittal hereafter next mentioned; and the defendant, contriving and intending as aforesaid, afterwards falsely, maliciously, and without any reasonable or probable cause, caused and procured the plaintiff to be tried by and before a court-martial, for that purpose duly assembled, on board his Majesty's ship Princess Royal, before John Montague, Esq., Admiral of the blue, and others, for the said supposed crimes and offences, and upon a false, malicious, and injurious charge of delaying and discouraging the public service, on which he, the plaintiff, was ordered on the said 16th of April, 1781, and

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for disobeying his, the defendant's, verbal orders, and public signals, in not causing the cable of his Majesty's ship *Isis*, then under his command, to be cut or slipped immediately after his getting on board in order to put to sea after the enemy, as he, the defendant, had directed, and also for falling astern and not keeping up in the line of battle according to the signal then abroad, after the *Isis* had joined the squadron, and cleared the wreck of the foretopmast, when he, the defendant, bore down upon the enemy, about sun-set of the said 16th April; at which said trial, the said court-martial, having heard the witnesses produced in support of the said charge, and by the plaintiff in his defence, and having heard what the plaintiff had to urge in his defence, and having maturely and deliberately weighed and considered the whole, was of opinion that the plaintiff did not delay or discourage the public service on which he was ordered, on the said 16th April, 1871; that, from the circumstances proved of the condition the *Isis* was in, it appeared to the said court-martial, that the plaintiff was justifiable in not immediately cutting or slipping the cable of the *Isis*, after his getting on board her on that day; and that, after the wreck of the foretopmast had been cleared, the plaintiff did his utmost to regain his station in the line of battle; and that the *Isis* was in her station about sun-set of that day; the Court did therefore adjudge the plaintiff to be honourably acquitted of the whole of the said charge, and he was thereby honourably acquitted accordingly; by means of which said false, malicious, and wrongful proceedings of the defendant, he, the plaintiff, not only suffered and endured a long and grievous imprisonment for a long space of time (to wit), for the space of two years, seven calendar months, and nineteen days, but during that time lost and was deprived of divers sums of money, amounting in the whole to 20,000*l.* of lawful money of Great Britain, which he would otherwise have gained, if he had not been suspended and

removed by the defendant from his rank and post of captain and commander of the said ship called the Isis, from prizes and captures, which were taken and made from the enemy by the said ship the Isis, and the other ships of the said squadron, during the arrest and suspension aforesaid; and also suffered from grief, vexation, and anxiety of body and mind, and was put to expenses amounting to the sum of 5000*l.* in and about the defending himself against the said false and malicious charge; and was also thereby damnified, in his good name, fame, character, and reputation.

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The second count was similar to the first, except in this particular, that it did not allege, as part of the defendant's accusation, the consequence of the disobedience of the orders, namely, that the enemy were enabled to take their disabled ships in tow, &c., and that an opportunity was lost of improving the victory which the commodore had gained.

The third count,—after reciting the history of the engagement and the return of the squadron to Port Praya Bay, the placing of the plaintiff under arrest, and his suspension from his rank until, as the defendant alleged, a court-martial could be held for his trial—alleged as follows: Yet the defendant, well knowing the premises, but contriving, and wrongfully, injuriously, and maliciously intending, to hurt, aggrieve, vex, oppress, injure, and damnify, the plaintiff, and to cause him to be kept under such arrest and imprisonment, and to be suspended and removed from his said rank, station, post, and office, of captain and commander of the said ship the Isis, for a long and unreasonable space of time; and during such time to deprive him of the benefits, profits, and advantages appertaining to such rank, wilfully, wrongfully, and injuriously, and contrary to the duty of the defendant as such Commander-in-Chief as aforesaid, omitted, neglected, and refused to hold, or cause to be holden, a court-martial for the trial of the plaintiff

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during the stay of the said squadron at Port Praya Bay, or at any time after the departure of the same squadron from Port Praya Bay, whilst the same remained under the command of the defendant in foreign parts; and thereby wilfully, wrongfully, and injuriously, kept and detained him, under the said arrest, imprisonment, and suspension for a long and unreasonable space of time; and the plaintiff says, that he afterwards was tried by a court-martial, duly assembled, and was by the said court-martial honourably acquitted. The count then alleged special damage similar to that in the first count.

The fourth count differed from the third in the same manner that the second differed from the first.

Plea.

To the foregoing declaration the defendant pleaded Not Guilty.

Verdict.

This cause was twice tried before the Chief Baron (Sir J. Skynner) at Guildhall, by special juries; on the first trial the jury found a verdict for the plaintiff, with 5,000*l.* damages, and on the latter they gave 6,000*l.*

Motion in
arrest of
judgment.

Afterwards a motion was made in the Court of Exchequer, in arrest of judgment, and on the 15th June, 1785. Eyre, B., delivered the unanimous opinion of the Court in favour of the plaintiff, upon grounds which sufficiently appear from the following extracts from the judgment:—

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As to the first count of the declaration, it is objected, in arrest of judgment, that no action for a malicious prosecution will lie for a subordinate officer against the commander of a squadron for improper conduct while under his command; that no action lies for a subordinate officer against his superior officer, for an act done in the course of discipline, and under powers incident to his situation (*b*).

The Commander-in-Chief of a squadron of ships of

(*b*) The Court then refer to *Wall v. Machamara* (*cor.* Lord Mansfield, 1783, cited 2 Gilb. on Evid. by Lofft,

p. 558), and *Fabrigas v. Mostyn* (*ante*, p. 637) as bearing very strongly against this proposition.

war is in the condition of every other subject of this country, who, being put in authority, has responsibility annexed to his situation.

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It may not be fit, in point of discipline, that a subordinate officer should dispute the commands of his superior, if he were ordered to go to the mast-head; but if the superior were to order him thither, knowing that from some bodily infirmity it was impossible he should execute the order, and that he must inevitably break his neck in the attempt, and it were so to happen, the discipline of the navy would not protect that superior from being guilty of the crime of murder. And one may observe in general, in respect of what is done under powers incident to situations, that there is a wide difference between indulging to situation a latitude touching the extent of power, and touching the abuse of it. Cases may be put of situations so critical that the power ought to be unbounded; but it is impossible to state a case where it is necessary that it should be abused; and it is the felicity of those who live under a free constitution of government, that it is equally impossible to state a case where it can be abused with impunity. The counsel for the defendant were disposed to agree to this general doctrine, provided that the question was not to be discussed in an action at law, which unavoidably brings the inquiry into a matter of fact before a jury. We enter into all the difficulties in the situation of an officer, whose honour and fortune may come to be so staked. But considerations of this nature cannot exclude the established jurisdiction of the country. Men of honour will do their duty, and will abide the consequences.

It is objected that there is no averment or allegation of title to prize money; that it does not follow from the fact stated that the prize money was lost; that by law the prize money was not lost, and that the jury have therefore found damages which by law could not be found.

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We are clearly of opinion that this objection must be overruled. The damages are well assigned by stating that the loss happened by reason of the wrong complained of; the rest is matter of evidence; and if anything which can now be suggested would have proved the loss to have happened by that means, after verdict we must suppose that proof to have been given. The objection therefore resolves itself into the last branch of it, viz., that the jury have found damages which could not possibly arise in the case, and could not therefore by law be found. To support which proposition, it has been argued that a suspended captain is entitled to the prize money for captures made during the time of his suspension. The proclamation must be the rule by which this point is to be decided. By the proclamation, the captain of a king's ship, who shall be actually on board at the taking of any prize, shall have a certain proportion. Is one who had been suspended and removed from his rank and post of captain, and was in that state of suspension when the prize was taken, the captain of such ship actually on board at the taking of such prize? It is enough to state the question; it answers itself. Not having original jurisdiction in matter of prize, we cannot decide that question so as to affect the right of prize money; but we are obliged to decide it as far as it is incidental matter in this cause, and for the purpose of this cause. And premising this, we hold, in this case, that the plaintiff, by reason of his suspension and removal, did lose the prize money which he would have gained from prizes taken by the *Isis* and other ships during his suspension, and consequently that this is well assigned as special damage in this action.

It is objected on the third count of this declaration, the grievance complained of in which is, the refusing and neglecting to hold a court-martial for the trial of the plaintiff, while the squadron was under the defendant's command, and then keeping him under arrest till his trial

in Great Britain, that this is *damnum sine injuriâ* ; that the law has fixed no time, short of the term of three years, within which courts-martial are to be held ; and therefore it could not be the duty of the commander to hold a court-martial at any time within that period, or so soon as he reasonably and conveniently could after the charge exhibited, and consequently that the averments, that it was the duty of the defendant to hold such court-martial ; that the defendant might reasonably and conveniently have held a court-martial ; and that he wilfully, wrongfully, and injuriously, and contrary to his duty, omitted, neglected, and refused to hold such court-martial ; cannot give to the plaintiff a cause of action. The answer to this objection is, that every breach of a public duty, working wrong and loss to another, is an injury, and actionable ; that the three years are only a limitation of time, beyond which no court-martial shall be held ; consistent with which it may be the duty of those who have power to hold courts-martial to hold them within a much shorter space. It is a familiar qualification of powers of various kinds, that they should be executed within a reasonable time. Suspension and arrest being incident to the power of holding a court-martial, it seems an essential ingredient in such a power, and absolutely necessary to qualify the rigour of it, that it should be executed in a reasonable time ; otherwise a power of holding a court-martial would necessarily involve in it a power to imprison for three years previous to the trial, which could not be borne. The usage of the navy might have made it the duty of the Commander-in-Chief, in a case where it did not speak so strongly for itself : how it becomes his duty, is to be shewn in evidence, in proof of the averment that it was his duty, and, after verdict finding that it was his duty, must be taken to have been sufficiently proved. It must also be taken to have been proved that there was no impediment in the way, and, under these circumstances, the not holding a court-martial, and the plaintiff's having sustained loss and

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damage thereby, both which circumstances we must consider as proved, constitute a good cause of action, upon which judgment may be now given.

In Michaelmas Term, 1785, the defendant brought a writ of error upon the judgment in the Exchequer Chamber, assigning as errors:—1. That the declaration is not sufficient in law. 2. That by the record it appears, that judgment ought to have been rendered for the defendant. 3. That damages have been assessed against the defendant generally for each of the supposed offences in the declaration mentioned; whereas it manifestly appears in and by the declaration and record, that the plaintiff had reasonable and probable cause to arrest, suspend, and bring the defendant to trial by a court-martial. 4. That the Barons of the Exchequer have decided upon a question not cognizable in a court of law, inasmuch as it appears, by the record, that the supposed offences, in the declaration mentioned, were committed by the defendant, as Commander-in-Chief of a squadron of his Majesty's ships of war, in the due course of discipline, and under powers legally incident to his station as such Commander-in-Chief, and whilst the plaintiff was serving as an officer in the squadron under the command of the defendant. 5. That damages have been assessed against the defendant for the supposed loss of prize money by the plaintiff; whereas the plaintiff hath not, by reason of the premises in the declaration mentioned, lost or been deprived of any of the said prize money, but is still entitled thereto. 6. That damages have been assessed against the defendant for a delay in bringing the plaintiff to trial by a court-martial; whereas, by the law of the land, an action will not lie for any such delay as is charged in the declaration.

† This case was argued on the 2nd of February, 1786, before Lord Mansfield, C.J. (c), and Lord Loughborough,

C.J. (*d*), by Dallas for the plaintiff in error, and Bower for the defendant; and again by Erskine for the defendant in error: Scott was to have argued for the plaintiff in error, but the Court were satisfied upon the former argument.

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The counsel for the plaintiff in error did not, in arguing this case, confine himself to the order in which the errors were assigned. He argued thus:—

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As to the second error, the Commander-in-Chief of a squadron of ships of war is bound, as such, to superintend and regulate the conduct of those under his command; to arrest and bring them to trial before a court-martial for all offences committed against the articles for the government of the navy, or the custom of the same; and if he omit to do it, where there is cause, he is himself liable to be punished for the neglect. He is, therefore, in this respect, different from any private accuser. It appears on the record that the plaintiff in error acted in this capacity; nor is it alleged that he has done any single act without legal powers, which would have made it necessary to bring a different action: but it is charged that he perverted those powers, with which by law he was invested for purposes of public utility and advantage, to the ends of malice and oppression; and that the defendant in error has thereby suffered the injury of which he complains. Although the jury have found a verdict for the defendant in error, and the averments in the declaration, namely, that the plaintiff in error accused the defendant falsely and maliciously, and without any reasonable or probable cause, must now be taken to be true, and it must likewise be taken to be true that the defendant in error has sustained an injury to the extent found by the verdict, yet, in point of law, the judgment cannot be supported.

An action cannot be maintained against the Commander-in-Chief of a squadron of ships of war for accusing, arrest-

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ing, and bringing to trial a subordinate officer, he having by law an authority so to do, notwithstanding that the perversion of his authority is made the ground of the action, as in the present case; or, in other words, an action on the case for a malicious prosecution will not lie at the suit of a subordinate, against his commanding officer, for an act done in the course of discipline, and under the powers legally incident to his situation. This doctrine is apparently repugnant to a maxim of law, that there is no wrong without a remedy; but this, though generally, is not universally, true; and a great variety of cases exist to which it does not apply; or, at least, in which the remedy cannot be in the shape of a civil action to recover damages for the injury sustained. There are many instances, in some of which it is universally held, and in others has been expressly adjudged, that an action on the case for a malicious prosecution will not lie, though the act complained of be admitted to be malicious. The principle of all such cases is, that the law will rather suffer a private mischief than a public inconvenience. As there is no adjudged case expressly in point, it must be shewn that, by analogy, and on principles of public policy and convenience, as recognised in courts of justice, this action cannot be maintained. No action will lie against a judge for any act done in his judicial capacity; nor against a grand jurymen for presenting or finding a bill of indictment; nor against a petit jurymen for his verdict; though the act done should be charged to be wrongful and malicious. This doctrine, and the reasons of it, are stated in *Floyd v. Barker (c)*, where one of the defendants was a justice of the grand sessions in the county of Anglesea; there it was resolved by the Lord Chancellor, the two Chief Justices, the Chief Baron, and all the Court of Star-chamber, that “when a grand inquest indicts one of murder or felony, and after the party is acquitted, yet no conspiracy lies for

him who is acquitted against the indictors, for this that they are returned by the sheriff, by process of law, to make inquiry of offences upon their oath, and it is for the service of the king and commonwealth." *Stowball v. Ansell* (f) was an action on the case against a jurymen for maliciously indicting the plaintiff of barratry. After a verdict for the plaintiff, on a motion in arrest of judgment, it was resolved that the action did not lie, although it was laid *malitiose*. From *Floyd v. Barker* it appears that the law raises a presumption in favour of jurors, and will not even admit proof to the contrary; departing herein from the common maxim, that the presumption shall only stand till the contrary be proved. This rule must have been adopted on the principle stated by Lord Coke, namely, that it would deter jurors from the public service if they were liable to such an action in every case, where, in the opinion of the parties against whom they had decided, their decision proceeded from malicious motives. If such actions could be maintained, the multiplicity of them would render it impossible for a judge or juror to discharge the duties of his office. The exemption is, therefore, established on behalf of the public, and results from principles of policy and convenience. The prosecutor of a malicious indictment is liable to an action on the case for a malicious prosecution, in preferring such an indictment before a grand jury; yet if the same person, serving on the grand jury, were maliciously to present, or to find, such an indictment, no action would lie. Thus it is clear, that the same act, done by the same person, and proceeding from the same evil motive, is, or is not, actionable, according to his acting in a private, or a public capacity. In *Hawkins* (g) it is laid down, "that no one is liable to any prosecution whatever, in respect of any verdict given by him in criminal matters either upon the grand or petit jury:" and he states the reason to be, "that

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(f) Comberb. 116.

(g) P. C., Bk. I. chap. 27, s. 5.

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they may not be biassed with the fear of being harassed with vexatious suits for acting according to their consciences." The situation of a Commander-in-Chief of a squadron of ships of war is analagous to that of a grand juror, in those respects, whereby the latter is exempted from this species of action. All the arguments of impolicy and inconvenience apply more strongly. He is a public officer, and has public duties to discharge; he must act in arduous and difficult times; he is responsible for his conduct while in command; and he is invested with legal authority over those serving under him, for public purposes. By his situation he is in the nature of a public prosecutor, and it is his duty to bring offenders to trial, either on the information of others, or from his own knowledge and belief. He is himself punishable for neglect of duty, if he omit to do it, where there is sufficient cause. But if this action can be maintained, the inducements would be so much stronger than in any other case, that it would be more frequently brought. Such frequency would deter commanders from doing their duty, from the dread that an action would follow in every case where prisoners were acquitted. The event of actions well and ill founded would undoubtedly be different; but the enquiry leading to the event would necessarily be vexatious and expensive. It is of more consequence that a Commander-in-Chief should have no such bias on his mind, than that a grand juror should have none. The safety of the state is declared by the Act (*h*), establishing articles for the government of the navy, to depend chiefly on the discipline of the navy. That discipline depends principally on the chief person in command. The safety of the State is therefore materially interested in his conduct; and he should be consequently secured from any fear of doing his duty from any possible consequences. Arguments of impolicy and inconvenience could not avail, if this were a decided case: but it is the

first action of the kind; and it is to new and undecided cases that the maxim peculiarly applies, *Quod inconv-niens est non licitum est.*

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But there are other arguments of impolicy and inconvenience against this action in the case of a Commander-in-Chief for an act done in the course of discipline, namely, that every action of this kind must necessarily involve an enquiry into subjects, which those who are to try the cause cannot reasonably be presumed to understand. It is not so in the common case of an action for a malicious prosecution, where the jury are fully competent to that enquiry from which the malice is to appear; for the question, whether a man was maliciously indicted of any misdemeanor or felony, must be tried by persons of the same description as those who tried the original indictment. But in such a case as the present, it is otherwise. A jury cannot be supposed competent to the trial of a question of naval discipline, depending upon a science to which they are strangers, where the evidence must be in terms which they cannot be reasonably supposed to understand, and connected with habits, feelings, and principles, arising from situations in life, in which they have never been placed. The law has recognised this incompetence, and made provisions accordingly, by specially constituting a tribunal, namely, a court-martial, before which offences against military or naval law are to be tried. Then, if a jury be incompetent to try the original charge, they are equally incompetent to try a civil action, in which the sole question must be, whether that charge was properly made. In every action of this nature, the plaintiff must shew that the defendant accused him maliciously, and without any probable cause: malice of itself is not sufficient; the want of probable cause must be likewise shown; but whether the cause were probable or not can only appear from an investigation of the charge, and to such investigation the jury must be presumed incompetent. It is true that, upon the trial of such an action, the jury

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have in evidence the sentence of the court-martial, acquitting the person accused : but that does not remove the objection. For, in point of law, the sentence itself is not sufficient to entitle a plaintiff to recover ; but he must lay before the jury the substance of the evidence, on which that sentence was given. For the question in such an action is, not whether the plaintiff was innocent or guilty, but whether the defendant acted without malice, and had reasonable and probable cause to prefer the accusation, which the sentence itself will not shew : for the plaintiff may have been perfectly innocent, and yet the defendant be justifiable in having accused him : so that the charge must in effect be tried again by the jury, before they can give their verdict. It may be said that, besides the sentence of the court-martial and the evidence on which it was grounded, they may have the opinions of professional men ; but opinion is never admitted but from the necessity of the case, and is only suffered to be produced upon this principle, that a jury must necessarily be presumed but imperfectly qualified to try questions which depend upon knowledge they cannot be supposed to possess, but that the law has not appointed any tribunal more competent to the purpose. Thus, in cases of murder, a surgeon is examined to prove whether the wound given was the cause of the death of the deceased. So, in an action upon a policy of insurance, where the question of wilful loss arises, naval men may be examined as to their opinion, whether the ship was properly navigated or not. But the law has left all these questions to be decided in the common course by a jury, without having made (as in the present instance by the establishment of a court-martial) any special provision for another mode of trial ; from which incompetence must, in point of law be inferred. If it were otherwise, the jury might as well have tried the original charge on the evidence, assisted with the opinions of professional men : and there is no reason

why they should not be as competent to do it in the form of a criminal accusation, as in the shape of a civil action. If it be urged, as it was on the motion to arrest the judgment, that this doctrine places every subordinate officer out of the protection of the law, and reduces him to a state of servile dependence on his superior officer, in favour of whom it establishes a despotic and uncontrollable power; the answer to it is, that the stat. 22 Geo. 2, c. 33 (i), has expressly declared, that "if any flag-officer, &c., shall be convicted before a court-martial of acting in a scandalous, infamous, cruel, oppressive, and fraudulent manner, unbecoming the character of an officer, he shall be dismissed his Majesty's service." Every officer, therefore, who suffers by the false and malicious accusation of his commander, may bring him before a court-martial for such conduct, and procure his dismissal from the service. This is the safeguard of subordinate officers against oppression. But it may be said that this is no compensation to such an officer; that the law should enable him to recover damages proportionate to the injury. In this respect, however, he is in no worse situation than other subjects of this country, on a variety of occasions of a similar nature. It is perfectly clear, that whatever damage may be sustained by the wrongful and malicious act of a judge, or grand or petit juror, acting as such, the party injured cannot recover a pecuniary compensation for the wrong sustained. And so in all cases where the civil injury amounts to a felony; there, no other compensation can be recovered than what is dispensed in the form of public punishment (k). Every crime includes a private injury; every public offence involves a private wrong; but the atonement in such cases must be to the public, and the indi-

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(i) Sec. 2, art. 33.

(k) That is to say, the civil remedy is suspended until public justice has

been satisfied; Broom's Comm. 6th ed. pp. 110 *et seq.*

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vidual is without any civil redress. In the present instance, therefore, there is no civil redress, and the remedy must be of a criminal nature. This is the first action of this sort, notwithstanding innumerable occasions for it must have occurred. There are many instances in which court-martials have, in their sentence, expressly declared the charge to be false and malicious. There are many others in which officers have been dismissed the service for infamous behaviour in preferring false and malicious charges. Yet an action of this nature never before occurred. The argument of negative usage is extremely strong. In *Le Caux v. Eden* (l) this argument was admitted to have great weight, and the language of the Court in giving judgment in that case applies with peculiar force to the present. And Buller, J., there said, "an universal silence in Westminster Hall, on a subject which so frequently gives occasion for litigation, is a strong argument to prove that no such action can be maintained."

But if the Court should be of opinion that no distinction can be admitted between this and common actions for a malicious prosecution, still the judgment must be reversed for the error 3rdly assigned (m).

First, it is to be observed that, even in common cases, this action is not to be encouraged. In *Savile v. Roberts* (n) Lord Holt, C. J., expressly said, "though this action will lie, yet it ought not to be favoured, but managed with great caution." The same doctrine was laid down by Lee, C. J., in *Reynolds v. Kennedy* (o), and is adopted by Blackstone (p). The courts of law, in effect, exercise a control over this action, by withholding a copy of the indictment, where there is the least probable cause; and among the orders to be observed by justices of the peace

(l) Dougl. 594.

(m) *Ante*, p. 666.

(n) 1 Ld. Raym. 374, 381.

(o) 1 Wils. 233.

(p) 3 Com. 21st ed. 126.

and others, at the Old Bailey sessions, prefixed to Kelyng's Reports is the following one: "that no copies of any indictment for felony be given without special order upon motion made in open court; * * for the late frequency of actions against prosecutors (which cannot be without copies of the indictments) deterreth people from prosecuting for the king upon just occasions" (q). The principles of this kind of action are in some measure stated in *Savile v. Roberts*, and *Jones v. Gwynn*, which were actions for malicious prosecution. In the former of these, Lord Holt said, "If the indictment be found, the defendant in such action will not be bound to shew a probable cause, but the plaintiff will be constrained to shew express malice and iniquity in the prosecution." But the law, as now settled, does not exactly agree with either of these cases. It is not necessary, as stated by Lord Holt, that the plaintiff should prove express malice, for it may be implied from a causeless prosecution. The true foundation of the action, as settled at this day, is to be found in *Farmer v. Darling* (r), where it is stated, "That malice, either express or implied, and the want of probable cause, must both concur" to support this action. They do not concur in the present instance, but, on the contrary, a reasonable and probable cause is stated on the record; consequently there is wanting an essential requisite to support the action. As the term "malice" does not necessarily import the want of probable cause, it is immaterial whether the malice was expressly proved, or inferred from the groundlessness of the prosecution. For if expressly proved, and there be probable cause on the record, it is not sufficient; and if there be probable cause on the record, it cannot legally be inferred. The terms in the declaration, "maliciously, and without reasonable or probable cause," are terms of legal import

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(q) See *Legatt v. Tollervey*, 14 East, 302, 306.

(r) 4 Burr. 1971, 1974.

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to be determined by the judge who tries the cause, from the evidence before the jury; or by the Court from what is stated on the record. It was so determined by all the judges in *R. v. Oneby* (s); and in *Jones v. Gwynn*, Parker, C.J., said, that "malice" and "maliciously" are terms of law (t). The word "reasonably" is likewise a term of law (u). The term "probable" is merely synonymous with "reasonable"; and what is probable cause is matter of law; or, in other words, the probability of the charge preferred is to be a legal inference from the facts given in evidence before the jury, or the averments on the record (x). *Jones v. Gwynn* proves this position. For there Parker, C.J., argued that malice involved the want of probable cause, and therefore it was not necessary expressly to allege it; and he stated it as perfectly clear that "malice" was a term of law, and therefore to be determined by the judge, and not the jury. Then if malice be a term of law, and involve the want of probable cause, *Omne majus continet in se minus*, and consequently "probable cause" must be a matter of law. In *Reynolds v. Kennedy* (y), which was a writ of error, from the King's Bench in Ireland, on a judgment in an action for a malicious prosecution, the judgment was reversed because a foundation for the prosecution appeared on the record; so that the court took upon them to judge what was a foundation, or, in other words, a probable cause. It is said (z) that probable cause for a prosecution for perjury is to be determined by the judge, not the jury. It is true that there is a *quere* in the margin; but that doubt must now be at an end. For at the sittings at Guildhall after Michaelmas Term, 1785, an action (a) for maliciously and without any reasonable or probable cause

(s) 2 Lord Raym. 1493.

(t) 10 Mod. 214; S. C. Gilb. 185.

(u) 2 Inst. 222; Co. Litt. 56, b.;

Metcalf v. Hall, Trin. T. 22 Geo. 2.

(x) Broom's Comm. 6th ed. p. 729.

(y) 1 Wils. 232.

(z) Bull. N. P. 14.

(a) *Candell* (otherwise *Barbanell*)
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holding the plaintiff to bail, was tried before Buller, J., who stated to the jury that there were two questions to be determined: 1st, whether the facts in evidence were true; 2ndly, whether, if true, they shewed a want of reasonable or probable cause; and the learned judge added, "what is reasonable or probable cause is matter of law"; and he then gave his opinion upon the case.

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The present record contains averments, which, in point of law, constitute a reasonable and probable cause; and the verdict of the jury, which is the foundation of the present judgment, is a finding of the averments on the record. In every action of this sort, the plaintiff must shew what has become of the original prosecution, either that it was deserted, or that, having been prosecuted, he was acquitted (*b*). In the present case, the defendant in error was acquitted; but that of itself is not sufficient to exclude the idea of reasonable and probable cause. In *Jones v. Gwynn*, it is said, that "the determination must be such as does not admit a reasonable cause for the prosecution; as if a pardon be pleaded which admits in some sort guilt, however is quitting the vindication of innocence, or justification, which admits the fact, and consequently reasonable cause of complaint (*c*)."
The defendant in error has stated in his declaration the sentence, by which he was acquitted, whereby it appears that the facts, with which he was charged, were found to be true, but justified; and consequently that there was reasonable cause of complaint.

There are three things to be considered: 1st, the charge; 2ndly, the articles, or custom of the navy, on which it was founded; 3rdly, the sentence of the court-martial. The charge is one entire charge, though apparently consisting of three distinct articles: 1st, delaying and discouraging the public service; 2ndly,

(*b*) Broom's Comm. C. L. 6th ed.
p. 736.

(*c*) Gillb. 215.

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disobedience of orders ; and, 3rdly, falling astern, and not keeping up in the line of battle according to the signal then abroad, &c. The first part of the charge is grounded on the 14th article for the government of the navy (*d*). The second article, viz., the disobedience of orders, contains a specification of what that disobedience consisted in, namely, the not causing the cables of the *Isis* to be cut and slipped immediately after his getting on board, &c. There are two articles in the Act of Parliament, namely, the 11th and the 14th, within either of which disobedience of orders is an offence that may be capitally punished. The third charge falls within the 11th, 14th, and 22nd articles ; inasmuch as the signal was disobeyed by his not keeping up in the line of battle, the service was thereby delayed and discouraged, and the utmost was not done to join battle with the enemy.

As to the first article of the charge, the court-martial find, "That it appears to them, that the prisoner did not delay or discourage the public service on which he was ordered on the 16th of April, 1781." Supposing therefore this to be a substantive charge, and the only one against him, he would by this sentence be fully acquitted.

With respect to the second article, they state, "That from the circumstances proved, and the condition the *Isis* was in, it appears to the Court that the prisoner was justifiable in not immediately cutting or slipping the cable of the *Isis* after his getting on board her on that day." This finding constitutes a probable cause, or, in other words, states such appearances of guilt as rendered an enquiry necessary. It is not found that no such orders were given, or that, being given, they were obeyed ; but the prisoner is declared "justifiable" in not immediately cutting or slipping the cable, which negatively admits the order to have been given and disobeyed. The acquittal is therefore founded, not on the falsehood of the fact

charged, but on a justification resulting from a combination of circumstances. This falls expressly within the doctrine stated in *Jones v. Gwynn*, namely, "justification which admits the fact, and consequently reasonable cause of complaint." Taking then the acquittal as it is, it constitutes a probable cause.

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But the acquittal is in itself illegal; and the illegality appears on the face of it. It admits the order to have been given, and that the prisoner might have obeyed it, and it does not state that it was an unlawful order: the term "justified" imports this; for it would be an absurdity to have declared him justifiable in not having done that which it was not in his power to do, or which was against law. It cannot be disobedience, where obedience is impracticable, or legally improper, for the term implies a crime; whereas there can be no criminality in omitting to do what is physically impossible, or forbidden by law; and the acquittal would have been general if this had been the case. The court-martial have therefore justified disobedience to a lawful command, which is directly repugnant to the 22nd article, and to the oath which they took. The justification is therefore illegal, and consequently is the strongest case of probable cause, namely, the fact found and justified, but the justification not legal. It may not be true to the utmost possible extent, that the fact being found by the sentence establishes a reasonable cause of complaint; and perhaps cases may be imagined to the contrary. But the position is, that wherever the acquittal is not general, but the accused is expressly justified, *ex vi termini* the sentence imports that there were appearances of guilt, and therefore probable cause (e). In this case, the justification constituting a probable cause, and that justification being stated on the record, the Court cannot presume the want of what actually appears.

(e) *Reynolds v. Kennedy*, 1 Wils. 232.

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As to the third part of the charge, the sentence in part admits, and in part denies, the facts it contains. The words are, "That after the wreck of the foretopmast had been cleared, the prisoner did his utmost to regain his station in the line of battle, and that the Isis was in her station about sun-set of that day."

The fact stated in the charge is therefore admitted, viz. that he fell astern, and did not keep up in the line of battle; but they find a contradiction to the charge, that he was in his station about sun-set. The words "did his utmost to regain," here again form a justification of the fact, and there is not a full and perfect acquittal of this part of the charge.

If it be said that, if for one part of the charge there was probable cause, for the other there was not, the declaration is *felo de se* with respect to the former, but good as to the latter, in which case, after verdict, the jury must be presumed to have given damages for that part only which is actionable; as in the case of an action for words, where some words in the same count are actionable, and others are not: the answer to it is, that that part of the charge for which it is supposed there is no probable cause, because there is a complete acquittal, is necessarily connected with that part, for which there is probable cause; and they are in effect one entire charge. The order given was "to cut or slip immediately," the sentence finds that the order was not obeyed; then a delay must necessarily have taken place, and the sentence is absolutely inconsistent with itself. For the delay, being a necessary consequence of the non-obedience, ought likewise to have been found and justified: but it is impossible that an order that could have been obeyed immediately, was not, and yet the non-obedience did not occasion delay. Suppose the charge of disobedience had been found, there could not possibly have been an acquittal as to the delay and discouragement. The charges depend upon each other, and the only reason why they

are stated separately, and the first not made consequential to the second, was, that the charge might be adapted to the different articles established by the Act of Parliament.

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The declaration itself does not deny that the order was given, nor aver that it was obeyed: but it does not state the order contained in the charge; it only admits, "that the captains, &c., were thereupon ordered by the plaintiff in error to cut or slip their cables, and put to sea after the squadron belonging to the French king." It omits the word "immediately," in which the materiality of the order consists. Then it is averred, "that the defendant during the whole of the 16th of April conducted himself as a gallant, obedient, and faithful captain, and did his duty as such to the best of his power, &c."; and he denies that he "wilfully or willingly disobeyed orders or signals." As to the other parts of the charge, a direct negative is put on the delay and discouragement: but as to the charge of falling astern, the denial is, "that he did it wilfully or willingly."

The declaration having averred that the defendant in error did his duty according to the best of his skill and ability, and the state and condition of his ship, alleges that such state and condition was known to the plaintiff in error, and therefore it is argued that, in this case, those facts, which on the sentence of the court-martial justify the defendant in error, namely, the circumstances proved of the state and condition of his ship, were within the knowledge of the plaintiff in error when he preferred the charge; and consequently that he accused the defendant in error, knowing him to be innocent. But admitting the plaintiff in error to have known all the evidence produced before the court-martial, the consequence does not follow that he knew the defendant in error to be innocent. Such facts existing as were *primâ facie* criminal, the defendant could only be acquitted by a justification: but justification is a conclusion of law, resulting from facts in evidence, and therefore not for

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the prosecutor, but the court to make. This is clearly the doctrine of the common law of England (*f*). Suppose A. preferred an indictment against B. for murder, and the jury found it manslaughter, it would not be sufficient to maintain an action for a malicious prosecution against A. for B. to aver in his declaration that A. knew the facts from which the legal inference of manslaughter was drawn.

To delay and discourage the public service, and to disobey orders and signals, are offences against naval law; but, like offences against the common or statute law, may be justified by circumstances, and in like manner that justification must be made by the tribunal constituted by the law to inquire into such offences. Therefore though the plaintiff in error might know all that is alleged in the declaration he did, still, these facts requiring a justification, it was his duty to bring the defendant in error before a court-martial; it being their province to determine whether the facts amounted to a justification. The same observations apply to the general averment in the declaration, namely, that the plaintiff in error knew the defendant to be innocent; his innocence consisting in his justification, and that justification being matter of law.

The fifth error assigned is, that damages have been assessed for the loss of prize money (*g*), whereas no such loss has happened by reason of the premises in the declaration mentioned.

The declaration charges that, by means of his arrest, suspension, and imprisonment, the defendant in error has lost divers sums of prize money, to which he would otherwise have been entitled. This loss is therefore stated to be the consequence of certain premises in the declaration specified; but as in point of law a different conclusion follows, the defendant in error has recovered for a damage

(*f*) 22 Ass. 77; Fitzh. Nat. Brev. 114; Bro. Abr. Corone, pl. 89.

(*g*) *Ante*, p. 666.

which has not happened. The allegation of such loss from the premises mentioned is an averment of law on the record, and which therefore the judge at the trial was to decide, and not the jury; and consequently is now open for the examination of the court. In point of fact this was sustained as a question of law both at the trial and on the motion in arrest of judgment, on both which occasions it was decided against the plaintiff in error. But such decision is against law. The title to any prize money can only accrue under his Majesty's proclamation, which, being referred to in the Prize Act (*h*), must be considered as part of the Act, and is therefore before the court. The proclamation expressly directs that all prizes shall be for the benefit of officers, &c., in our pay, and of seamen, mariners, and soldiers, on board our ships at the time of capture. The right to prize money under the proclamation consists in being in the pay of the Crown, as an officer or private man, on board the ship making the capture, at the time of the capture. It is not alleged in the declaration that the defendant in error, by means of any part of the conduct of the plaintiff, ceased to be in the pay of the Crown; nor is the loss of pay stated as part of the special damage: but on the contrary, by the 21st sect. of the stat. 22 Geo. 2, c. 33, it is expressly enacted in the case of such ships as should be lost, in which case a court-martial must be held to inquire into such loss, that if it shall appear by the sentence of the court-martial that the officers or seamen did their utmost to preserve or recover the ship, they shall be paid to the time of their discharge. Suspension does not in any case occasion the loss of pay; dismissal alone can produce such an effect; and all that the declaration alleges is suspension, arrest, and imprisonment.

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The next point is, whether the defendant in error was on board his ship at the time when the captures were

(*h*) 21 Geo. 3, c. 15.

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made. But there is no averment that he was not ; nor is it alleged that he was removed from his ship : the allegation is, that he was removed from his rank and post of captain. The proclamation on which the claim to prize money depends, requires a return to be made to the Commissioners of the Navy of all persons actually on board at the time of the capture, and their quality. There ought therefore to have been an averment that the defendant was not on board ; and the return should have been given in evidence under the Act. It is clear that the substance of what is alleged in the declaration is, that prizes were made by the *Isis* while the defendant in error was on board, to a share of which he would have been entitled, but for his arrest, suspension, and imprisonment. No case positively determines this to be law ; and reason, policy, and natural justice, are the other way. It is a principle of natural justice that no man shall suffer for that of which he is innocent : and no inconvenience can follow from the acquittal of an officer placing him in that situation in which he would have been, if he had not been suspended and tried. On enquiry at the Admiralty no case has been found ; but the following note has been furnished as an extract from a manuscript book, respecting the proceedings of Admiralty and Ecclesiastical Courts, in the handwriting of Sir E. Simpson (i) : “ Offence—undoubted rule in Admiralty and Ecclesiastical Courts, that person suspended for an offence supposed, of which he is afterwards acquitted in proper Court, is entitled to all the intermediate profits.” “ Thus in case of capture of prize at sea, the officer in arrest being actually on board, and afterwards duly acquitted or restored to his station, shall share the prize money.” “ So in civil causes in Admiralty—If a master

(i) Appointed Judge of the Consistory Court, A.D. 1747, and Dean of the Arches, A.D. 1758. See

Haydn, *Book of Dignities*, pp. 253, 254.

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turn his mate without just cause before the mast, and he sue for wages as mate for the whole time, he may recover, though he did not do the duty." "So if a clergyman be suspended *ab officio et beneficio*, and upon an appeal declared innocent, he will recover the profits of the living."

"Profits—Person suspended from an office entitled to intermediate profits, if innocent."

The defendant in error has therefore recovered damage on an allegation of law which is not true.

The sixth error assigned is, that damages have been assessed for a delay in bringing the defendant in error to a court-martial (*k*), whereas, by the law of the land, an action will not lie for any such delay as is charged in the declaration.

This error applies only to the 3rd and 4th counts, which are for a nonfeasance, as the 1st and 2nd are for a misfeasance.

The declaration charges that the plaintiff in error wrongfully and injuriously, and contrary to his duty as Commander-in-Chief, neglected and refused to hold a court-martial as soon as he reasonably and conveniently might. All the arguments of analogy, impolicy, inconvenience, implication of law, danger to the discipline of the navy, and negative usage, apply equally to these counts, as to the first and second. What is a reasonable and convenient time to hold a court-martial at sea or in port is an enquiry to which a jury are as incompetent, as to examine what constitutes a reasonable and probable cause for a prosecution against naval law, and for the same reasons. There is no instance of such an action having hitherto been brought.

But there is this further and most material objection. The 1st and 2nd counts are founded on the innocence of the defendant in error, established by the sentence of a competent tribunal; the 3rd and 4th on the guilt of the

(*k*) *Ante*, p. 666.

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plaintiff in error, without any charge having been preferred, or trial had, before any such tribunal. To support the 1st and 2nd counts it was necessary for the plaintiff to allege his acquittal; to uphold the 3rd and 4th he ought, by a parity of reason, to aver the defendant's conviction. The neglect to hold a court-martial is a military offence, and ought to have been tried by a court-martial; but to bring an action for such neglect in the first instance is, in effect, to make a jury try the original charge. The 1st and 2nd counts aver that the defendant in error was acquitted: but there is no allegation in the 3rd and 4th that the plaintiff in error was convicted of the neglect charged. The same reasons would recur to prevent this action, even if the plaintiff in error had been tried for the supposed neglect by a court-martial, and acquitted thereof, as have been urged against the 1st and 2nd counts, founded upon the acquittal of the defendant in error.

But, supposing these reasons to be over-ruled, this additional objection will remain, which is also peculiar to the 3rd and 4th counts.

The declaration charges, 1st, that it was the duty of the plaintiff in error, as Commander-in-Chief, to have held a court-martial as soon as he reasonably and conveniently could. 2ndly, That he might have held a court-martial, there being, during the whole suspension, a competent number of officers belonging to the squadron to compose such court. Now this averment is insufficient; and the insufficiency is of the substance of the action. It is an action against a public officer for a breach of duty in the execution of his office; and it is of the substance of the action to state in what that breach consists. To have stated that it was his duty to have held a court-martial as soon as he reasonably could, would not have been sufficient, without alleging that he had the power; and the breach of duty consisting in not using the power he had, that power must be expressly

shewn to prove the breach of duty. To see whence the power to hold courts-martial must be derived, recourse must be had to the stat. 22 Geo. 2, c. 33, s. 6, which gives the Lords of the Admiralty power to grant commissions to any commanding officer to call and assemble courts-martial, consisting of commanders and captains. By this it appears that the power of assembling a court-martial is not necessarily incident to the office of Commander-in-Chief, but must be derived from a commission to be granted by the Commissioners of the Admiralty. The averment is therefore bad, that it was his duty as Commander-in-Chief. The plaintiff in error could not, within this clause, have the power to hold a court-martial without such commission; and, if so, it ought to have been expressly averred, that he had such commission. To enable him to hold a court-martial two things were necessary; 1st, That he had a commission, giving him such authority; 2ndly, That there were a competent number of officers. The second is alleged, but not the first; so that it is not shewn that he had the power, for there might be a competent number of officers, and yet be no commission conferring authority to hold a court. Section 9 of that statute, which only provides for the accidental meeting of five ships in foreign parts, is not applicable to the present case.

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The declaration alleging that it was the duty of defendant as commander of a squadron to have assembled a court-martial, and the power to hold such a court depending upon the law of the land, the Court must look to the Act of Parliament to find whether, as commander, it was his duty; and the law being clearly otherwise, and that which confers the authority, namely, a commission, not being alleged, there is no authority shewn.

For the defendant in error it was argued as follows:—

The 1st error assumes the action to be maintainable, if the plaintiff in error maliciously, and without reasonable or probable cause, did arrest, suspend, and bring the

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defendant to trial : but it alleges that a reasonable and probable cause appears on the face of the record.

This probable cause is argued to appear on the record from the charge, and the manner in which the defendant in error appears to have been acquitted of it, namely, not from the facts on which it was framed being negatived by the sentence of the Court, but from a justification of his conduct having been made to appear from circumstances shewn to the Court in evidence : whence it is argued, that the existence of the facts on which the charge was founded, leaves probable cause. But the answers to that argument are, first, that no probable cause for any of the charges does appear upon the record from the language of the sentence of the court-martial, by which the defendant in error is acquitted of them ; much less, when coupled with the antecedent part of the record. Secondly, that in the utmost latitude of construction of the language of the sentence, and the utmost extent of the argument founded on it, the probable cause could extend but to one of the charges ; the facts of the others being expressly negatived. And as the action would have been maintainable for the other two, independently of the third, the Court will, after verdict, intend that the jury gave their damages for those charges which were actionable.

First. To support the present action, there must be malice express, or implied, and a want of probable cause. What is malice express cannot be misunderstood. Malice implied can only be implied from circumstances ; and the total want of a probable cause is evidence of malice. If it can be shewn that a prosecutor knew the party prosecuted to be innocent, prosecuting under that impression is decisive proof of malice ; for it could not be from public motives. What therefore is probable cause is the great matter for consideration. The definition of probable cause is such conduct in an individual accused as will warrant a legal and reasonable suspicion of offence against the law in the

mind of the person accusing, so as that a Court can infer a prosecution to have been taken up on public motives. It is a mixed question of fact and law. What circumstances existed, and what knowledge the prosecutor had of them, is a question of fact: but when the facts are known, and the mind of the prosecutor is laid open to the jury by evidence, then, whether it were a reasonable or unreasonable cause of proceeding is a question of law.

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It is a clear maxim, that no man who prosecutes another for a crime, believing him to be wholly innocent of it, can, if the party be acquitted, lay hold of a technical probable cause from future circumstances. It matters not whether the party prosecuted be acquitted of the offence from the facts of the charge not being proved, or from a justification, taking them to exist, if the prosecutor were acquainted with the fact, and the just effect of such justification arising out of it before he proceeded. As for instance, if a Commander-in-Chief, whose signal had been disobeyed, knew that the officer disobeying it did it from such motives as made the disobedience perfectly justifiable in the officer, and was convinced of his rectitude; such commander could not suspend and try him, merely because the defence (which is known to him) must come from the officer himself in the shape of a justification. The plaintiff in error must therefore establish that there is sufficient on the face of the record to shew positively that he acted upon a reasonable and legal ground of suspicion of guilt, to entitle him to legal protection for having prosecuted, notwithstanding his malicious motive, which stands admitted by the averment, stating that he did it maliciously. It will not be sufficient that it should stand indifferent on the sentence, whether there was probable cause for one charge, or not; for the declaration having averred that the plaintiff in error brought the defendant to trial without any reasonable or probable cause, and the jury having found it, the want of that pro-

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bable cause, so distinctly averred, must be taken to exist, unless the record contain matter repugnant to such averment. And the record must be construed, like all other legal instruments, *ut res magis valeat quam pereat*; the sentence must be reconciled with the averment, if they be reconcilable in language. In order to determine whether there be any matter directly repugnant to the averment, it is necessary to examine the record, viz., the two first counts, to which only the objection applies. The declaration avers that although the defendant in error during the whole of the engagement, &c., conducted himself as a gallant officer, and did his duty to the best of his power, considering the state of his ship, and was never guilty of any of the charges particularly specified, yet the plaintiff in error well knowing the premises (namely, the innocence and merit of the defendant in error, which was antecedently averred in the declaration), but maliciously, and without any reasonable or probable cause, suspended, arrested, imprisoned and brought him to trial for delaying and discouraging the public service, for disobeying the commodore's verbal orders and public signals, in not causing the cables of the Isis to be slipped immediately, &c., and also for falling astern, &c., of which the declaration had averred him to be innocent, and innocent within the knowledge of the plaintiff in error.

The first part of the sentence, namely that he did not delay and discourage the public service, is an express negative, not only of the first charge in form, but of all in substance; for if the defendant in error did not delay or discourage the public service, he could not be guilty of any of the charges. The second part of the sentence, namely, that, from the circumstances proved of the condition of the Isis, the defendant in error was justifiable in not cutting or slipping his cable immediately, means, that, the defendant in error having acted rightly in not immediately cutting or slipping his cable, his not doing it was not in naval law or discipline a disobedience. It makes

no difference whether the impossibility of obeying be physical or moral. The conduct of the defendant in error cannot be considered as a disobedience of the commodore's orders, but an obedience to the spirit, and a legal and justifiable dispensation with the strict form of the order. It was so considered by the final adjudication going to all the charges; for the court-martial honourably acquitted him of the whole of the charge. They considered it justifiable conduct as opposed to disobedience. But even taking it to be a disobedience completely justified, not excused, and that the plaintiff in error knew the fact constituting the justification, it is sufficient. And the Court will not now presume that the condition of the ship, which constituted the justification, or its effect, as a justification, was unknown to the plaintiff in error. For the record excludes the presumption of ignorance. It is not necessary for the defendant in error to shew from the declaration that the commodore had not probable cause; but the plaintiff in error must shew that, on the record, he certainly had. For there is a positive averment that he had not, and the whole record must be construed together if reconcilable. In *Reynolds v. Kennedy*, there was no averment that the defendant had no probable cause, or that he well knew the premises; and the judgment in that case was very proper; for though the information was false, yet the defendant might have had probable cause. There, *non constat* that the charge was false within the defendant's knowledge; here it is positively averred; in that case there was a condemnation; in the present a direct acquittal. And the present record contains those averments for the want of which the judgment was arrested in that case.

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The second answer to the argument for the plaintiff in error is, that the probable cause (supposing the first answer to be unfounded) extends at the utmost to the second charge, and leaves the first and third defenceless; the facts of them being negatived. And after verdict the

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Court must intend that the damages were given for their only. Wherever the injury is charged to have been committed at one and the same time, and the matters, in which such injury is charged to consist, appear, some to be actionable, and others not, the Court will presume after verdict that the damages were given for the actionable part.

As to the second error. It cannot be denied as a general proposition that whenever any subject of England suffers damage from any illegal or injurious act of another, short of felony, the law gives him a remedy by civil action, and without any previous conviction of the act. And in this case it is not contended that the injurious act complained of is a felony. If, therefore, this action is not maintainable in principle or substance, supposing it properly brought in point of form, it is an exception to a general rule of law. The general rule of law supporting the action, the exception must be established by the plaintiff in error; and that exception must go the length of saying that an officer in the navy forfeits or voluntarily surrenders all the civil rights belonging to other subjects, when the injury proceeds from a superior officer, under colour of discipline; even although the act done be admitted to have been done in opposition to discipline, in violation of naval duty, maliciously, and without cause. This can only be established by a current of direct authorities, or the silence of precedents, which shew that the analogies and the policy of the law warrant the conclusion.

As to the first, no case, or even *dictum*, can be shewn, to prove that an action for a malicious prosecution cannot be maintained against an officer for the abuse of the authority delegated to him by the king's commission.

As to the latter, it has been contended that the action cannot be supported on account of the dangerous consequences to the public, and by analogy to other cases. It

is true, that the public is deeply interested in protecting all righteous prosecutors of civil offences from the consequences of mistaken judgments. But such protection is sufficiently afforded to all subjects by the arduous proof thrown on plaintiffs seeking this sort of redress; and not by holding out a previous indemnity to malignity, cruelty, and injustice.

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The principle contended for only protects the judges of the king's courts of record (*l*). It is obvious with respect to them: there is no court equal to the trial of the superior judges of the realm for facts done in judicature. But the plaintiff in error cannot be considered in the situation of a judge. If the question had been, whether an action for a malicious judgment would lie against a member of a court-martial, acting within his jurisdiction, there might have been some analogy; but the plaintiff in error is to be considered rather in the light of a prosecutor than a judge.

As to grand and petit jurors in criminal cases, their exemption arises from a jealousy of prerogative; it would have been dangerous in the extreme to have allowed an attaint for the king; and it would have been impossible to have given an attaint for the subject, and none for the king. But in civil cases an attaint lies (*m*).

No case can be cited to shew that the Attorney-General would not be civilly answerable for a corrupt abuse of discretion; the argument is proving *ignotum per ignotius*; and on principle and strong analogy he is answerable. The protection given to persons acting for the public is in no cases extended farther than to officers concerned in the revenue, who are frequently obliged to act on slender suspicions, and would otherwise be open to endless prosecutions (*n*).

By analogy to those actions which have been brought

(*l*) *Miller v. Seare*, 2 W. Bla. 1141.

(*n*) *Cooper v. Booth*, 3 Esp. 135.

(*m*) *Ante*, p. 150.

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against governors of provinces, islands, and garrisons, military officers, and even officers of the navy, it is clear that this action is maintainable.

The admission that actions of trespass *vi et armis* may be maintained for acts of officers in the navy or army, not even acting from malice, but mistaking the extent and limits of their authority, cuts up the great question of policy by the roots. It was so considered by the Barons of the Exchequer when judgment was given below. The action of trespass supposes the act complained of to be illegal, and, if the defendant justifies, the whole burthen of proof is thrown on him; for he must make out his justification. In this kind of action the plaintiff is bound to state his whole case on the record; and, unless he proves every part of it he cannot recover. But at all events the form of the action does not alter the nature of the thing, for which an action is maintainable. The action on the case is brought for one of two reasons, either that the injury is consequential, or, if direct, that the act, though legal, was from a bad motive. In the present case the bad motive is the gist of the action. Every principle which the court laid down in the case of *Fabrigas v. Mostyn (o)* is applicable to the present. And the language made use of by Lord Mansfield in *Wall v. M'Namara (p)* is particularly strong. That was an action brought by the plaintiff, as captain in the African corps, against the defendant, as Lieutenant-Governor of Senegambia, for imprisoning him for nine months at Gambia in Africa. The defendant pleaded the general issue, intending to justify the imprisonment under the Mutiny Act for disobedience of orders. At the trial it appeared that the imprisonment, which at first was legal, namely, for leaving his post without leave from his superior officer, though in a bad state of health, was aggravated with

(o) Cowp. 161; *ante*, pp. 636, 637.

(p) Cor. Lord Mansfield, Sitings

after Mich. Term, 1783, cited 2 Gillb.

on Evid. by Lofft, p. 558.

many circumstances of cruelty. Lord Mansfield, in summing up to the jury, said, "In trying the legality of acts done by military officers, in the exercise of their duty, particularly beyond the seas, where cases may occur without the possibility of application for proper advice, great latitude ought to be allowed, and they ought not to suffer for a slip of form, if their intention appears by the evidence to have been upright; it is the same as when complaints are brought against inferior civil magistrates, such as justices of the peace, for acts done by them in the exercise of their civil duty. There the principal inquiry to be made by a court of justice is, how the heart stood? And if there appears to be nothing wrong there, great latitude will be allowed for misapprehension or mistake. But on the other hand, if the heart is wrong, if cruelty, malice, and oppression appear to have occasioned or aggravated the imprisonment or other injury complained of, they shall not cover themselves with the thin veil of legal forms, nor escape, under the cover of a justification the most technically regular, from that punishment which it is your province and your duty to inflict on so scandalous an abuse of public trust. It is admitted that the plaintiff was to blame in leaving his post. But there was no enemy—no mutiny—no danger. His health was declining, and he trusted to the benevolence of the defendant to consider the circumstances under which he acted. But supposing it to have been the defendant's duty to call him to a military account for his misconduct, what apology is there for denying him the use of the common air in a sultry climate, and shutting him up in a gloomy prison where there was no possibility of bringing him to a trial for several months, there not being a sufficient number of officers to form a court-martial? These circumstances, independent of the direct evidence of malice, as sworn to by one of the witnesses, are sufficient for you to presume a bad malignant motive in the defendant, which would destroy his justifi-

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cation, had it even been within the powers delegated to the defendant by his commission" (q).

So that where an officer makes a slip in form, great latitude ought to be allowed; but for a corrupt abuse of authority none can be made. Yet, according to the argument for the plaintiff in error, no latitude is afforded to the first, and absolute impunity to the last.

Swinton v. Molloy (r), was an action of false imprisonment brought by the plaintiff as purser of the Trident man-of-war, against the defendant, who was his captain. The defendant pleaded a justification for a supposed breach of duty. But, it appearing in evidence that the defendant had imprisoned him for three days without inquiring into the matter, and had then released him on hearing his defence, Lord Mansfield said, that such conduct on the part of the defendant did not appear to have been a proper discharge of his duty, and therefore that his justification had failed him under the discipline of the navy. But suppose that Captain Molloy, instead of releasing the plaintiff on hearing his defence, had kept him confined till he came to England, and had then made a charge against him in order to justify himself, the same policy which suffered an action of false imprisonment in that case for the incautious, though upright, conduct of the defendant, would have supported an action on the case founded on cool deliberate malice and injustice, not covered by a pretence of discipline.

The analogy between the present case and *Sutherland v. Murray* (s) is very strong to shew that a person representing the king in all functions, civil and military, where the act complained of is expressly legal, shall answer for

(q) In this case there was a verdict for the plaintiff, damages 1000*l*.

(r) Sittings at Westm. after Mich. T. 1783.

(s) Sittings at Westm. after East.

T. 1783. The action was twice tried, the first verdict being imperfect; and the damages were given on the second trial.

an abuse of his authority. There the declaration stated that the defendant was Governor of Minorca, and Vice-Admiral of the island, that the plaintiff was judge of the Vice-Admiralty Court, with all fees, emoluments, &c., and that the defendant, to injure and oppress him, maliciously, and without any reasonable or probable cause, suspended him from his office, *per quod* he lost his profits, &c. On the evidence it appeared that General Murray had legal authority to suspend till the king's pleasure was known; that he had so suspended him, and directed the Secretary of State to take the king's pleasure on it. The General professed himself ready to restore him if he made a particular apology; the king approved of the suspension unless the terms were complied with. There the plaintiff recovered 5000*l.*, and it never occurred to any lawyer that there was any pretence to move in arrest of judgment. The gist of the action was admitting the legality of the suspension thus confirmed, but complaining of the defendant's exercise of his original authority, and his malicious and false representations, by which the suspension had been confirmed.

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The argument on the incompetency of juries to try questions of this nature, is not entitled to much weight, when it is considered that almost all the injuries which one individual may receive from another, and which are the foundation of numberless actions, involve in them questions peculiar to the trades and conditions of the parties: and if this argument were well founded, such actions could never be tried. In an action against a surgeon for ignorance, the question may turn on a nice point of surgery; but the jury must attend to the witnesses, and decide according to their number, professional skill, and cause of knowledge; for *cuiuslibet in sua arte credendum est*. In an action on a warranty of a life in a policy, physicians must be examined. So for injuries on streams to one mill by another, millwrights and engineers must be produced. Many questions even of navigation

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must occur, which must necessarily be decided by a jury; as in a case under the Hovering Act (t) when unavoidable necessity is to exculpate;—so in cases of deviation on policies of insurance;—or in cases of seaworthiness;—or when one ship runs down another at sea by bad steering. Yet those actions are much more difficult, because they depend solely on questions of navigation. But the gist of the present action is malice, and want of probable cause, which cannot involve any question of navigation and sea-fighting; and the present verdict was not founded on any such evidence.

But if jurors are not competent to try such a question, the plaintiff is without any remedy at all. A court-martial can give no redress to the injured party. As to *Le Caux v. Elden*, which was cited for the plaintiff in error, there the imprisonment complained of was an immediate consequence of seizing a vessel as prize. And the question of prize or no prize, and its immediate consequences, are notoriously of Admiralty jurisdiction. But the Court, in that case, went principally on the Admiralty having jurisdiction to redress the parties in damages.

As to any objection that may arise to an action of this sort before a defendant has been tried and convicted by a court-martial under the 33rd article of war; that argument holds in no case short of felony. For if it were to prevail in the present case, it might, with the same reason, be extended to many others; as, for instance, no action would lie for maliciously holding to bail without a previous conviction for perjury.

The extreme difficulty which stands in a plaintiff's way, in this kind of action, is an answer to the supposed impolicy of entertaining it. The knowledge that no action lies for any injury, except from malice and injustice, while it can never check the conduct of good men, may form a check on the bad. But even if it be impolitic to

(t) See 24 Geo. 3, c. 47.

entertain actions of this nature, it is a legislative, not a judicial duty to repel it.

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As to the 3rd error. The loss of prize-money for prizes taken while Captain Lumley (who was appointed to succeed to the defendant in error) commanded the *Isis*, during the suspension of the defendant in error, is charged upon the record as a legal consequence of that suspension. This is assigned as error, and it is alleged that that suspension did not carry that legal consequence; the defendant in error being entitled by a species of *jus postliminii* (u) to all those rights which would have belonged to him if he had never been accused, suspended, and tried. But the defendant in error can have no prize-money but what he is entitled to under the king's proclamation. Now the proclamation gives the captain, who shall be actually on board on the taking of any prize, three-eighths. The term "actually on board" has repeatedly received a legal construction. It does not mean merely personally on board; but on board in the actual station and capacity in which the prize-money is claimed. And therefore the proclamation requires the captain and other officers to make out and subscribe prize lists, stating the quality of the persons on board, and to transmit them to the commissioners of the navy. The real meaning of the proclamation in this particular underwent a solemn discussion in *Wemys v. Linzee* (x), where it was determined, by the Court granting a new trial, that a captain of marines, who happened to be on board a frigate when she took a prize, but did not belong to her complement, should share only as a passenger. If that decision be right, the defendant is not entitled to any part of the prizes taken after his suspension. For Captain Lumley was to all intents and purposes captain of the *Isis*, and actually on board as captain when the

(u) As to the *jus postliminii*, see 6th ed.
Sandars, Inst. Just. pp. 146, 267,

(x) 2 Dougl. 324.

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prize was taken. Indeed, according to the doctrine of the *jus postliminii*, the defendant in error is entitled to his pay as well as prize-money during his suspension ; in which case Captain Lumley had no title to receive it ; for both could not. But as the plaintiff in error undoubtedly had authority to appoint Captain Lumley to the office of captain with all the emoluments, the consequence is unavoidable, that Captain Lumley was entitled, during the whole time he commanded the *Isis*, to all the advantages which the law gives to the captain of a ship, and consequently to the prizes in question. Neither does it appear on the record that, when the prizes in dispute were taken, the defendant in error was actually on board ; and if he were not on board, he could not share even if captain. No *jus postliminii* therefore can attach in the present case, without destroying the effect of Captain Lumley's commission both as to prize-money and pay, and reducing him to lose both in every station. For he had left his former ship, and could not share there because he was not on board, and his place was supplied ; and if he did not take prize-money as captain of the *Isis* he could not share in any other capacity on board her, nor in any capacity at all on board any other ship in the squadron. So that he would suffer an actual punishment and loss from an appointment to a legal commission ; for the pay and prize-money cannot belong to both.

As to the 4th error. It cannot be contended that, because an officer is not amenable to a court-martial after three years, no action can be maintained against a commanding officer for delaying contrary to his duty to bring an inferior officer to trial within that time. The gist of the two last counts, as well as of the others, is *mala fides*—oppression and injustice in the exercise of a legal discretion. The action is not therefore trespass, because the law authorizes the act ; but it does not protect *malam fidem* in the exercise of legal authority. It would be a harsh construction of a statute of limitation in favour

of officers subject to trial, to engraft upon it a right in superior officers to hold with impunity an inferior three years in confinement disgraced and suspended, when discipline and convenience justified a trial and enlargement immediately. If a commanding officer has this time in strictness of law, it may be an answer to an action of trespass, which calls the mere legality of the act in question, but is no answer to an action which impeaches the motive. For although a commander may have a right to detain an inferior officer accused in custody for three years, it may be, under circumstances, highly injurious and contrary to his duty to do so. The jealousy of the law in that respect is strongly marked in the Habeas Corpus Act, and the regular commissions of general gaol delivery.

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The 3rd and 4th counts sufficiently charge *malam fidem*. And there is no precise form necessary in an action on the case, as in a writ of conspiracy. In *Jones v. Gwynn*, Parker, C.J., said, "a formed action must be strictly pursued: but an action on the case allows a latitude, and makes nothing necessary but what the reason of the case makes so." Surely then if a person maliciously contriving to injure his neighbour, acts wilfully, injuriously, and contrary to his duty, that is in reason a charge of malice, and the action on the case requires no technical form. The jury having found that an earlier trial was reasonable, convenient, and just, and that the defendant contrary to his duty, wilfully, and injuriously, withheld it, the court cannot reverse the judgment for error without saying that, because the exigency of naval conjunctures may render it necessary for a Commander-in-Chief to keep an inferior officer suspended and in confinement for trial for three years, he is not responsible to civil justice for running to the end of that time, when humanity, justice, duty, and discipline, called for an immediate trial.

In answer to the 5th error, that it is not shewn upon the record that the plaintiff in error had authority to

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assemble a court-martial, which renders the charge of delaying it defective.—In the first place it is not assigned specially as error; but even if it had been it deserves no weight in this stage of the proceeding. The third count, after stating the charge, the arrest, and suspension until a court-martial could be had, avers, that although it was the duty of the defendant, as such commander, to hold the court as soon as he reasonably and conveniently could; and although the defendant as Commander-in-Chief might reasonably and conveniently have held the court while the squadron continued at Port Praya, yet the defendant, well knowing the premises (that is, well knowing that a court might reasonably and conveniently be assembled, and that it was his duty to hold it) but contriving, and wrongfully, injuriously, and maliciously intending to aggrieve, oppress, and injure the plaintiff, &c., he, the defendant, wilfully, wrongfully, injuriously, and contrary to his duty, omitted, neglected, and refused, to hold a court-martial at Port Praya, &c., and thereby wilfully, wrongfully, injuriously, and contrary to his duty, kept the plaintiff imprisoned and suspended until his trial and acquittal in England, by which, &c.

On this record it was argued for the plaintiff in error that it does not appear that he had authority to hold a court-martial; which want of power must arise either from his not having a commission to hold one, or that there was not a sufficient number of officers. But this objection is raised after a verdict. And the rule after verdict is, that where the plaintiff wholly omits to set forth the gist of his action or his title to recover, it is an incurable defect in substance; but if he set it forth generally, though without those circumstances which go to its formation and constitution, such circumstances as are necessary to establish the gist of the action, which is generally alleged, are to be presumed to have been proved at the trial, as otherwise the plaintiff must have been nonsuited.

In the present case it is a strained presumption, and contrary to the fact, that the plaintiff in error had no authority to hold a court-martial. Upon this record the court is bound to take notice of the situation of the parties. And it is scarcely possible to suppose that the Lords of the Admiralty would neglect to insert in the commission of a Commander-in-Chief the usual power to hold courts-martial. For it is so much a matter of course to give a Commander-in-Chief that power, that in case of his death, or removal, his successor succeeds to that power under the 22 Geo. 2, c. 33, s. 6.

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Besides, the general averment, that the plaintiff in error wrongfully, wilfully, and contrary to his duty, omitted to hold the court, made it necessary for the defendant in error to shew that it was the commodore's duty to hold it, which could not be done without proving that he had authority to hold it, and that there was a sufficient number of officers with him to enable him to exercise his authority. It falls therefore within the principle of all the cases cited. If he had neither authority nor numbers, his act was neither wrongful, wilful, nor contrary to his duty; neither could the averment be true, that he reasonably and conveniently could have held it.

As the verdict therefore is general, the court cannot but presume that those facts were proved, without which not a single averment in the 3rd count could have been established.

The following are the reasons on which the opinion of Lord Mansfield, C.J., and Lord Loughborough, C.J., in this case was founded; as reported to the Lord Chancellor.

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ment.

On the 2nd day of February last we heard this cause argued by counsel on both sides; and upon the 4th instant we heard it again fully argued by the counsel for Captain Sutton the defendant in error.

The record is printed, and in everybody's hands; there is therefore no occasion to state it.

The general question is, whether, upon the face of the

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declaration, after a verdict, sufficient matter appears to shew that the plaintiff ought not to recover?

There is no similitude or analogy between an action of trespass, or false imprisonment, and this kind of action. An action for trespass is for the defendant's having done that, which, upon the stating of it, is manifestly illegal. This kind of action is for a prosecution, which, upon the stating of it is manifestly legal.

The essential ground of this action is, that a legal prosecution was carried on without a probable cause. We say this is emphatically the essential ground; because every other allegation may be implied from this; but this must be substantively and expressly proved, and cannot be implied.

From the want of probable cause, malice may be, and most commonly is, implied. The knowledge of the defendant is also implied.

From the most express malice, the want of probable cause cannot be implied.

A man, from a malicious motive, may take up a prosecution for real guilt, or he may, from circumstances which he really believes, proceed upon apparent guilt; and in neither case is he liable to this kind of action (*y*).

After a verdict, the presumption is, that such parts of the declaration, without proof of which the plaintiff ought not to have had a verdict, were proved to the satisfaction of the jury. In this case, to support the verdict, there was nothing necessary to be proved, but that there was no probable cause, from whence the jury might imply malice, and might imply that the defendant knew there was no probable cause.

The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to shew it probable, or not probable, are true and existed, is a matter of fact; but whether, supposing them true, they

(y) See *Warren v. Matthews*, 6 Mod. 73.

amount to a probable cause, is a question of law; and upon this distinction proceeded the case of *Reynolds v. Kennedy* (z).

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Thus much we think fit to premise in general, as a material introduction to the discussion of the question upon this record.

The objections made by Johnstone, the defendant in the cause, come under two general heads:—

I. Supposing this kind of action to lie.

II. That it does not lie.

I. Supposing it to lie, the defendant has made the following objections:—

To the first count.

1st Objection, That there appears upon record a probable cause in law.

2nd Objection, That the declaration alleges, by way of special damage, as a legal consequence of the plaintiff's suspension, that he lost his share of the prize-money acquired by the ship during his suspension; which the defendant says is not true.

Upon the 3rd count it is objected, 1st, that it is not alleged that the defendant had a commission to hold courts-martial, and as Commander-in-Chief he had no such authority.

2ndly, That not holding a court-martial sooner, if any, is a mere military offence, contrary to the duty of the defendant, as commander; and the guilt has not been tried by any military tribunal, and in this respect is like the case of *Barwis v. Keppel* (a).

As to the 1st objection under the 1st head;

The charges against the plaintiff before the court-martial were formally two; but in reality and effect, one; to wit, the disobedience of the defendant's verbal orders, public signals, &c.

The 2nd charge is a consequence of the 1st, viz., for

(z) 1 Wils. 232.

(a) 2 Wils. 314.

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delaying and discouraging the public service on which he was ordered on the 16th of April, 1781; which delaying or discouraging arose from his not doing as he was ordered, no other instance being alleged.

The flight, the signals, the attempt to pursue, the enemy sailing off, are all admitted by the declaration. That the orders were, in fact, not obeyed, seems admitted too; for the plaintiff only avers, "that he did not wilfully and willingly disobey;" but the sentence of the court-martial shews clearly that the orders were disobeyed, and that the plaintiff justified himself by a physical impossibility to obey. Nothing less could be a justification.

A subordinate officer must not judge of the danger, propriety, expediency, or consequence of the order he receives: he must obey; nothing can excuse him but a physical impossibility. A forlorn hope is devoted—many gallant officers have been devoted. Fleets have been saved, and victories obtained, by ordering particular ships upon desperate services, with almost a certainty of death or capture.

The question then tried by the court-martial was, whether the plaintiff was justified in not obeying by physical impossibility? Now there cannot be a question more complicated. It involves the precise point of time; the state of the wind; the state of the ship; the position of both fleets. It requires great skill in navigation. There is no question likely to create a greater variety of opinions.

It is possible, the court-martial at Portsmouth, at a great distance of time, may have thought it was impossible to obey; and yet the whole squadron, who saw the action, might be of a different opinion. We use it only as a possible supposition; but we are warranted to make it, by a matter of fact, which it seems came out upon the trial of this cause.

In the printed notes of my Lord Chief Baron's argument upon granting a new trial, his Lordship says, "that

all the sea officers, those examined for the plaintiff, as well as those who were examined for the defendant, swore they should have held themselves bound to obey the orders given, if they had been in the situation in which the plaintiff was."

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Under all these circumstances, it being clear that the orders were given, heard, and understood; that in fact they were not obeyed; that, by not being obeyed, the enemy were enabled the better to sail off; that the defence was an impossibility to obey—a most complicated point—under all these circumstances, we have no difficulty to give our opinion, that, in law, the commodore had a probable cause to bring the plaintiff to a fair and impartial trial.

This probable cause goes to both parts of the charge; the disobedience, and obstructing the public service. But if it went to the disobedience only, it would equally avail the defendant in this cause. For it is not like the case put of a plaintiff recovering, where he lays, in the same sentence, words actionable, and words not actionable.

Here the defendant alleges a justification of the arrest, suspension, and trial. If his justification be allowed, there is an end of the action.

If the defendant were right in trying the plaintiff for disobedience, the adding delay, and obstructing the public service, were only two or three superfluous words, which created no additional trouble, vexation, or expense; and this action is not adapted to so trifling a complaint.

2nd objection under the 1st head.

The right to the prize-money in this case is, we understand, still in litigation between the plaintiff and others, who are no parties in the cause; and therefore, without necessity, we choose to give no opinion upon it: and if our opinion is right upon the other points, this is not necessary.

The 3rd count is upon a ground collateral to the prosecution. It is for delaying to hold a court-martial for the

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trial of the plaintiff, while the squadron under the defendant's command continued abroad, contrary to the duty of his office as Commander-in-Chief.

Objections have been made to the plaintiff's recovering upon this count;

1st, That it doth not appear upon the declaration, that he had authority to hold a court-martial.

2ndly, That the offence, as charged, is merely military, and contrary to the discipline of the navy; and the defendant has not yet been tried for it by a court-martial.

3rdly, Alleging loss of prize-money as a special damage. We have already said why we decline giving any opinion upon this.

As to the 1st, the averment is, that by law it was incident to the duty of his office to hold a court-martial: now the contrary is manifest from the statute law of the land. There is no fact to be tried by the jury. The allegation is a proposition in law, and stands upon the record. It is false, and therefore the basis of the charge, that the defendant had authority, is wanting; and this objection we think fatal.

As to the 2nd objection; the delay is charged to be contrary to the defendant's duty as Commander-in-Chief. There is no rule of the common or statute law applicable to this case. It is a mere military offence. It is the abuse of a military discretionary power; and the defendant has not been tried for it by a court-martial.

A court of common law, in such a case, cannot assume an original jurisdiction. It is like the case of *Barwis v. Keppel*. This objection we think fatal.

This is our opinion upon the 1st, 2nd, 3rd and 4th counts, supposing an action for a groundless prosecution before a court-martial to lie.

II. But the great and important question now brought into judgment for the first time, is, whether such an action can lie.

The occasion has often arisen at different periods of

time, when men of the fleets, put upon their trials before a court-martial, have thought the charge without a probable cause, and have warmly felt the injury of such an act of malice or oppression: yet, till this experiment, it never entered into any man's head, that such an action as this could be brought; consequently there is no usage, precedent, or authority, in support of it.

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This case stands upon its own special ground.

The wisdom of ages hath formed a sea military code, which in the last reign was collected and digested into an Act of Parliament. The great object of this code is, that the duty of every man in the fleet shall be prescribed and regulated by rules and ordinances adapted to sea military discipline; and that every man in the fleet, for any offence against his duty in that capacity or relation, shall be tried by a court-martial.

If a man be charged with an offence against the articles, or, where the articles are silent, against the usage of the navy, his guilt or innocence can only be tried by a court-martial.

A Commander-in-Chief has a discretionary power, by this military code, to arrest, suspend, and put any man of the fleet upon his trial. A court-martial alone can judge of the charge. But this military law hath foreseen that though it is necessary to give superiors great discretionary power, it may be abused to oppression; and therefore has provided against such abuse by the 33rd article.

A commander who arrests, suspends, and puts a man on his trial without a probable cause, is guilty within that article: but the same jurisdiction which tries the original charge, must try the probable cause; which in effect is a new trial. And every reason which requires the original charge to be tried by a military jurisdiction, equally holds to try the probable cause by that jurisdiction.

The salvation of this country depends upon the discipline of the fleet; without discipline they would be a

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rabble, dangerous only to their friends, and harmless to the enemy.

Commanders, in a day of battle, must act upon delicate suspicions; upon the evidence of their own eye; they must give desperate commands; they must require instantaneous obedience. In case of a general misbehaviour, they may be forced to suspend several officers, and put others in their places.

A military tribunal is capable of feeling all these circumstances, and understanding that the first, second, and third part of a soldier is obedience. But what condition will a commander be in, if, upon the exercising of his authority, he is liable to be tried by a common law judicature?

If this action is admitted, every acquittal before a court-martial will produce one.

Not knowing the law, or the rules of evidence, no commander or superior officer will dare to act; their inferiors will insult and threaten them.

The relaxation and decay of discipline in the fleet have been severely felt. Upon an unsuccessful battle, there are mutual recriminations, mutual charges, and mutual trials. The whole fleet take sides with great animosity—party prejudices mix—if every trial is to be followed by an action, it is easy to see how endless the confusion, how infinite the mischief will be.

The person unjustly accused is not without his remedy. He has the properest among military men. Reparation is done to him by an acquittal. And he who accused him unjustly is blasted for ever, and dismissed the service.

These considerations incline us to lean against introducing this action. But there is no authority of any kind either way; and there is no principle to be drawn from the analogy of other cases, which is applicable to trials by a sea court-martial under the marine law, confirmed, directed, and authorized by statute. And there-

fore it must be owned that the question is doubtful: and when a judgment shall depend upon a decision of this question, it is fit to be settled by the highest authority.

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According to our opinion it is not necessary to the judgment in this cause. Because, supposing the action to lie, we think judgment ought to be given for the defendant (the plaintiff in error).

This cause being removed into the House of Lords, the question was put to the judges by order of their lordships, what judgment or other award ought to be made upon the record as it now lies before the House?

Appeal to
the House
of Lords.

Gould, J., delivered the unanimous opinion of the judges present, that the judgment given in the Exchequer Chamber ought to be affirmed: whereupon it was adjudged accordingly (b).

Few cases are yielded by the Reports which concern military or naval officers. In *Macbeath v. Haldimand* (c), the defendant filled the office of Governor of Quebec, he likewise held military command, and it was against him in the latter, rather than in the former capacity, that the action was brought for the price of stores furnished for the use of government by order of the defendant. Now here it was admitted for the plaintiff, that "in general a commanding officer is not answerable for stores and other articles furnished notoriously for the use of government," but it was urged that he might "become so by his own conduct;" and it was contended that in the case before the Court the defendant had so acted as to render himself personally responsible, inasmuch especially as he had directed that the price of the stores

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(b) 1 Bro. P. C. 100.

(c) 1 T. R. 172.

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supplied should be liquidated by bills drawn upon himself. But Lord Mansfield observed there was no colour for saying that the defendant was liable in his character of Commander-in-Chief, and he referred to a case tried before himself, where the action was brought against Lord North, as first lord of the treasury, to reimburse plaintiff the expenses which he had incurred in raising a regiment for the service of government, but the action was held not to lie. Lord Mansfield referred also to a case of *Littleton v. Halsey*, where the defendant was a commissary for the supply of forage for the army, the plaintiff having been employed by the defendant in the procuring of supplies, and the defendant was held not liable. "Great inconveniences," observed Ashhurst, J., in *Macbeath v. Haldimand*, "would result from considering a governor or commander as personally responsible in such cases as the present. For no man would accept of any office of trust under government upon such conditions, and, indeed, it has frequently been determined that no individual is answerable for any engagements which he enters into on their behalf." "In any case where a man acts as agent for the public, and treats in that capacity, there is no pretence to say that he is personally liable" (*d*). Precisely in accordance with these principles were the decisions in *Myrtle v. Beaver* (*e*), and *Rice v. Chute* (*f*). These cases may usefully be consulted, should any question arise as to the liability *ex contractu* of the officer commanding a troop or regiment, for forage or necessaries supplied for the men by his direction; as may *Palmer v. Hutchinson* (*g*) with regard

(*d*) *Per* Buller, J., 1 T. R. 182.

(*e*) 1 East, 135.

(*f*) 1 East, 578.

(*g*) L. R. 6 App. Ca. 619; 50 L. J. P. C. 62.

to that of an officer of the Commissariat Department upon a contract entered into by him on behalf of such department. In any such case, should there be no special circumstances showing that the defendant's credit had been pledged, he will be taken to have contracted, not as an individual, but on the behalf of government. Nor is any hardship thus entailed upon creditors, for those who supply the goods know, or ought to know, that the money in payment for them is not to come out of the pocket of the officer in command (*h*):

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The liability *ex delicto* of a military or naval officer for an act involving negligence or malice, has occasionally been discussed. It may be sought to fix such a defendant with liability, I., at suit of one unconnected with the service; or, II., at suit of a subordinate who has an imagined grievance to redress.

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I. At suit of a stranger, an officer in the service of the Crown will be irresponsible for an act done by him in discharging his ordinary duty, or in obeying the orders of the government (*i*). Moreover, it may well be, that the duty of an officer towards the public is inconsistent with that course of conduct which in a private person might be deemed proper towards an individual, in this case the duty towards the public must be fulfilled (*k*).

—to
stranger.

Also instances have occurred, as observed by Lord Lyndhurst (*l*), where damage has been occasioned by the negligent management of ships of war, and where it has

(*h*) See *Rice v. Everitt*, 1 East, 582.

v. Steele, 6 Ch. D. 521; 46 L. J. Ch. 782, and cases *post*.

(*i*) See *per* Lord Lyndhurst, C., *Viscount Canterbury v. Att.-Gen.*, 1 Phill. 306; *Burns v. Nowell*, 5 Q. B. D. 444; 49 L. J. Q. B. 468; *Hawley*

(*k*) See *per* Bayley, J., *Forbes v. Cochrane*, 2 B. & C. 459.

(*l*) *Viscount Canterbury v. Att.-Gen.*, 1 Phill. 306; *et vide post*.

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been held that the captain is not liable in respect of an act done by one of the crew without his participation. In *Nicholson v. Mouncey* (*m*) the captain of a sloop of war was held not answerable for damage caused by her running down the plaintiff's vessel, the mischief appearing to have been done during the watch of the lieutenant, who was then upon deck, and had the actual direction and management of the steering and navigating of the sloop, the defendant not having been upon deck, nor by his duty required to be so, when the catastrophe occurred. Lord Ellenborough, C. J., in giving judgment in this case, remarked as follows: Captain Mouncey is said to be liable for the damages awarded "by considering him in the ordinary character of master of the vessel, by means of which the injury was done to the plaintiff's property. But how was he master? He had no power of appointing the officers or crew on board; he had no power to appoint even himself to the station which he filled on board; he was no volunteer in that particular station, merely by having entered originally into the naval service, but was compellable to take it when appointed to it, and had no choice whether or not he would serve with the other persons on board, but was obliged to take such as he found there and make the best of them; he had no power either of appointment or dismissal over them. The case, therefore, is not at all like that of an owner or master who . . . is answerable for those whom he employs for injuries done by them to others within the scope of their employment. . . . Here Captain Mouncey was a servant of his Majesty, stationed on board the ship to do his duty there, together with others equally appointed and

stationed there by the same authority to do their several duties. . . . Here there was no personal interference of the captain with the act of the lieutenant by which the damage was occasioned; both, indeed, were servants of one common master, but there was no consent by the one to the act of the other, unless that can be inferred from the community of their services." In accordance with the view thus expressed, the verdict which had been entered by direction of an arbitrator against the captain and the lieutenant of the watch with heavy damages was, so far as concerned the former defendant, set aside.

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In *Buron v. Denman* (n) the action was in trespass, and was brought by a slave-dealer resident on the coast of Africa, and there carrying on his trade, against a commander in the British navy on that station, charged with enforcing the provisions of a certain treaty between our own and the Spanish Government for the suppression of the slave-trade. The gist of the action was that the defendant had committed a trespass in destroying the property and liberating the slaves of the plaintiff; and in answer to this charge the defendant put on the record a series of pleas, by some of which he justified the alleged torts as having been done by the command of the Crown. The main question to be decided accordingly was, whether the conduct of the defendant in carrying away the slaves and committing the other alleged trespasses, could be justified as an act of State done by authority of the Crown? It was not indeed contended on behalf of the defendant that any previous authority for the particular acts complained of had been

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Denman.

(n) 2 Exch. 167; recognised Judgm. *Secretary of State of India v. Sahaba*, 13 Moo. P. C. C. 86.

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given by Government or by the Crown; his justification depending upon an alleged subsequent ratification of such acts. There was ample evidence to show that the government had expressed their approval and intimated their adoption of the defendant's acts, and it consequently remained only to consider whether the rule of law, applicable amongst private persons in regard to the effect of ratification—*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur* (o)—applied also to the Crown. The Court ruled that the ratification of the Crown was, under the circumstances before them, equivalent to a prior command, and operated to render the defendant irresponsible.

On the part of the plaintiff, it was argued in the above case that "the Crown can only speak by an authentic instrument under the Great Seal," and that, inasmuch as no ratification so authenticated had been given, the defendant was unprotected. The Court, however, upon this point, were clearly of opinion, that, as the original act would have been an act of the Crown if done in pursuance of a written or parol direction from the Board of Admiralty, so the ratification *sub judice* (which had been communicated by letter) was equally good and operative.

The rule which exempts from liability an officer in the service of the Crown for the consequences of an act ordered by Government, or sanctioned and ratified by it, may also be applied to the solution of questions differing somewhat from those which have hitherto been presented.

During the Crimean war, a case (p) came under the

(o) Leg. Max. 6th ed. p. 822.

N. S. 415; 26 L. J. C. P. 219.

(p) *Hodgkinson v. Fernie*, 2 C. B.

notice of the Court of Common Pleas, disclosing facts as under: The plaintiff and defendant were respectively owners of vessels which had been chartered by Government as transports for the conveyance of troops to the Black Sea; these vessels, whilst in tow of a steamer commanded by a naval officer, came into collision, whereby the plaintiff's vessel suffered damage, and the judge directed the jury at *Nisi Prius* that if in their opinion the injury complained of resulted from a strict obedience on the part of the master of the defendant's vessel to the orders of the officer in command of the steamer, the defendant would not be responsible. The jury indeed thought that the master could not be wholly acquitted of negligence in his management of defendant's vessel, and so the plaintiff had a verdict. The rule recognised by the Court in this case may be thus stated. When two vessels are chartered by the Government for an expedition such as that in question, one of the terms of the contract which the shipowners enter into is, that they shall pay implicit obedience to the persons in command; therefore, if one of them sustains damage from the other whilst acting in obedience to the orders of a superior officer, the owner of the vessel doing the damage cannot be held responsible at law to the owner of the vessel to which the damage is done (*q*). Obedience by subordinates to the orders of one placed in command over them is essential, not only to the success of the undertaking, but to the safety of all engaged in it (*r*). Doubtless the rule thus enunciated is founded on expedience, and, where direct authority is wanting, considerations of public safety and expedience may properly have weight. They

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(*q*) *Per* Cockburn, C. J., 2 C. B. N. S. 436. (*r*) *Per* Willes, J., 2 C. B. N. S. 435.

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cannot be allowed indeed to countervail the statute law, nor can they be put in the balance against precedents positive and express. Judicial discretion must be limited to discerning *PER LEGEM quid sit justum* (s). Yet where the finger of the law which ordinarily guides them omits to perform its function, we rejoice to follow the footsteps of our judges leading towards what is just and rightful.

An officer in the army or navy will clearly be amenable for any wrongful or injurious act, *i.e.* for any act *per se* tortious, not justifiable in virtue of an authority, general or special, emanating from Government or the Crown. Instances are cited in the Principal Case (t) in affirmance of the foregoing proposition. Others in support of it, yet more recent, may be advanced, *ex. gr.*, *Madrazo v. Willes* (u), where the captain of a man-of-war, for having destroyed a Spanish slaver wrongfully, though as he believed in performance of his duty, was held to be liable to the owner of the vessel for damage to the amount of 20,000*l.*

*Madrazo v.
Willes.*

*Tobin v. The
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In *Tobin v. The Queen* (x), an instructive case concerning the matter debated in this Note, the proceeding was by Petition of Right, which stated:—That the suppliants were shipowners carrying on business at Liverpool. That for the purposes of a trade in which they were engaged on the coast of Africa (where they possessed storehouses and factories) they had purchased a certain vessel. That this vessel was not, when it was so purchased, and never was, registered as a British vessel. That, until it was seized and destroyed, as afterwards

(s) 4 Inst. 41.

(t) *Ante*, pp. 694—697, which apply *à fortiori* to support the position *supra*. And see *per* Cockburn, C. J., *Feather v. Reg.*, 35 L. J. Q. B.

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(u) 3 B. & Ald. 353.

(x) 16 C. B. N. S. 310; S. C. 33 L. J. C. P. 199.

mentioned, it remained the property of the suppliants, and was never in any way engaged in the slave-trade. That in August, 1862, the said vessel was taken, under the charge of a seaman employed by the suppliants, to Cabenda, on the African coast, for the purpose of undergoing repairs. That she was there seized, as a vessel engaged in the slave-trade, by and under the orders of Captain Douglas, then being Commander of her Majesty's ship *Espoir*, and employed under the authority of her Majesty for the suppression of the slave-trade, according to the statutes in such case made and provided; and on the alleged ground that the said vessel was not fit for a voyage to St. Helena, being the place within her Majesty's dominions to which she ought to have been taken for the purpose of being brought to adjudication in the Vice-Admiralty Court there, touching the said seizure, she was afterwards, together with her cargo, wholly burnt and destroyed by the said Captain Douglas, so being such commander, and so employed under the authority of her Majesty as aforesaid, and in the supposed exercise of his duties under such last-mentioned authority. That the said vessel was not, at the time of her being so seized and destroyed as aforesaid, in any way engaged in the slave-trade or liable to be condemned as so engaged. That the value of the said vessel and cargo so burnt and destroyed as aforesaid amounted to 1000*l*. The petition alleged special damage to the amount of 10,000*l*., and prayed that her Majesty would be pleased to do what was right and just in the premises, and cause the suppliants to be reimbursed and compensated for the losses so sustained by them as aforesaid.

To the above petition, the Attorney-General on behalf of the Crown demurred, thereby admitting the following

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facts, viz. :—That the vessel was seized, as being engaged in the slave-trade, by Captain Douglas. That he commanded a ship of her Majesty, and was employed for the suppression of the slave-trade according to the statutes relating thereto, and that the vessel of the suppliants was not, at the time when it was so seized and destroyed, in any way engaged in the slave-trade, or liable to any proceedings as if it had been so engaged.

The Court of Common Pleas, in giving judgment upon the issue raised by the above-mentioned demurrer, commenced with observing that a wrong for which an action might lie against Captain Douglas was disclosed by the facts admitted. In holding that that officer had not, in the transaction under notice, acted as agent for the Crown, the Court indicated a liability attaching personally to himself:—If the vessel of the suppliants had been lawfully seized, Captain Douglas would have performed a duty imposed upon him by the stat. 5 Geo. 4, c. 113, s. 43 (*y*), enacting that vessels engaged in the slave-trade shall be seized by the commanders of ships of her Majesty, and although it is admitted that he was appointed to the ship, and ordered to the station, and employed by the Queen, “we think that the duty which he had to perform in relation to the slave-trade was not created by command of the Queen, nor would he have been doing an act which the Queen had commanded if the seizure had been made lawfully under the statute. The allegations on the record show that the seizure, although intended to be in accordance with the provisions of the statute, was unlawful because not authorised thereby. They further show that the vessel was not seized for the purpose of making

(*y*) See now 36 & 37 Vict. c. 88.

it the property of her Majesty, and, if lawfully seized, would not have been in possession of her Majesty, but under s. 44 the captors had the duty of taking it to the Vice-Admiralty Court for condemnation, and if condemned the captors were bound to sell, and divide the proceeds of the sale, and it could not be till after these contingencies had happened and the sale had taken place that the interest of the Crown in a share of the proceeds of the sale, according to the statute, would commence: and under s. 35 the captors would have been liable to a judgment against them in that court for damages and costs, if they had been found to be in the wrong. Thus, as Captain Douglas would not have been an agent of the Crown if he had lawfully seized and kept the vessel under the statute, still less ought he to be held to be such agent in seizing and destroying it unlawfully."

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The portion of the judgment above cited points to this conclusion, that the act complained of by the suppliants as injurious and damaging to them, had been that of an officer in the service of the Crown, presumably done in virtue or under colour of the statute law, but in reality not justified by its provisions (z). The passage which immediately follows, cited from the same judgment, is framed upon a hypothesis different from the former, yet likewise, such as would cast upon the officer named a personal liability.

"If," the Court continued, "it be assumed that Captain Douglas had authority from the Crown to seize all ships engaged in the slave-trade, so that the seizure, if lawful, would have been made by him in the capacity of agent for the Crown; still, if he seized a ship not engaged in the

(z) See *Burns v. Nowell*, 5 Q. B. D. 444.

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slave-trade, he would not act within the scope of that authority, and would not make his principal liable for that wrong. Thus, where a warrant was granted by the Secretary of State to apprehend the author of the 'North Briton,' and the defendant upon good ground of suspicion apprehended the plaintiff, who proved that he was not the author, the defendant was held not to have acted in obedience to that warrant, and to be responsible without a justification therefrom" (a).

Crown—
whether
responsible
for acts of
officer.

A question by no means foreign to the matter before us here demands consideration—can the Crown be made responsible for damage caused by the tortious act of an officer employed in its service? The answer to this query must be in the negative. We have already seen (b) that the appropriate mode of procedure against the Sovereign is by Petition of Right, and in *Tobin v. The Queen*, above cited, the Court decided that a Petition of Right cannot be maintained to recover unliquidated damages for a trespass from the Crown. "It is unnecessary," they observe, "to cite authorities to shew that the agent cannot make the principal liable for an act done beyond the scope of his authority. . . . But the claim of the suppliant to hold the Queen liable for the act of a captain in her Majesty's navy was rested upon a supposed analogy between the relation of servants to masters and of bailiffs to sheriffs on the one hand, and the relation of persons in her Majesty's service to the Queen on the other hand; so that as a master is liable for any wrong done by his servants in the course of their employment in his service, and a sheriff is responsible for any wrong done by his under-sheriffs or his bailiffs in the course of performing

(a) *Leach v. Money*, *ante*, p. 522.

(b) *Ante*, pp. 238, *et seq.*

the duties of the shrievalty, so the Queen ought to be held responsible for any wrong done by a captain of the navy in the course of his employment. . . . But the argument for the suppliant fails because in our judgment there is no analogy between the relation of the captain of a Queen's ship to the Queen, and the relation of servant to master, or bailiff to the sheriff, so as to create the liability here in question."

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The Court then refer to some classes of decisions in which the limits of the liability attaching to a superior for the acts of his subordinate are defined, in order to shew that the analogy contended for does not exist. For instance, "where the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment. On this principle it has been declared that superior public officers, such as the Postmaster-General, the Lords Commissioners of Customs and Excise, the Auditors of the Exchequer and the like, are not responsible for the negligence or misconduct of inferior officers in their several departments, though the superior officers appointed them and had the power of dismissing them" (c). . . . "So also the captain of a ship employing a pilot is not responsible for damage caused by the ship when under the control of the pilot, for the pilot performs a duty imposed by Act of Parliament, and is not under the control of the captain" (d).

Accordingly the Court conclude that "the supposed

(c) Judgm., 16 C. B., N. S. 351, citing *Whitfield v. Lord Le Despencer*, 2 Cowp. 754; cited *per* Lord Wensleydale, L. R. 1 H. L. 111, 124.

302; and see Stat. 17 & 18 Vict. c. 104, s. 388; *General S. N. Co. v. British and Colonial S. N. Co.*, L. R. 4 Ex. 238.

(d) *Lucey v. Ingram*, 6 M. & W.

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analogy between the relation of the Queen to a captain in her Majesty's navy, and the relation of a master to a servant, fails in the following respects:—1st. That the Queen does not appoint a captain to a ship by her own mere will, as a master chooses a servant, but through an officer of State, responsible for appointing a man properly qualified; and 2ndly. That the will of the Queen alone does not control the conduct of the captain in his movements, but a sense of professional duty; and 3rdly. Because the act complained of was not done by the order of the Queen, but by reason of a mistake in respect of the path of duty."

Then with respect to the supposed analogy to the responsibility of the sheriff for the under-sheriff and bailiff,—“the sheriff is under responsibility which is peculiar to that office; the under-sheriff is a general agent for the sheriff in respect of the duties of the shrievalty in the fullest extent, with the unusual power for a deputy to appoint a deputy, and make the principal responsible for every act of a bailiff done under a warrant issued by the under-sheriff.”

Petition of
right
... when it
lies.

Further as to the general question whether a Petition of Right can be maintained to recover unliquidated damages for a trespass. 1st. Reference has to be made to the principle that “the Sovereign cannot be guilty of a wrong, and so cannot be made liable to pay damages for a wrong of which he cannot be guilty. . . . The maxim, that the king can do no wrong (*e*), is true in the sense that he is not liable to be sued civilly or criminally for a supposed wrong; that which the Sovereign does personally the law presumes will not be

(*e*) As to which, see Broom's Leg. Max. 6th ed. pp. 46—59.

wrong; that which the Sovereign does by command to his servants cannot be a wrong in the Sovereign, because if the command is unlawful, it is in law no command, and the servant is responsible for the unlawful act, the same as if there had been no command" (f).

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Upon the authorities also the Court of Common Pleas in *Tobin v. The Queen* were of opinion that a Petition of Right was not, under the circumstances before them, maintainable; and, after an elaborate examination of cases tending to support that view (g), they remarked that "if each of the Queen's subjects who believed he had been at any time, in any reign, wronged in the administration of civil or military affairs could sue the Sovereign for the time being for the amount at which he might estimate his damage, the extent of pernicious result would be great. And we refer to the abstract of the Petition of Right adduced in evidence in *Irwin v. Sir George Grey* (h) as an example of the mischief that might arise if such was the law."

II. The Principal Case conclusively establishes that, on grounds of public policy and expediency, a superior

(f) 1 Hale, P. C. 43; 2 Inst. 186; 3 Bla. Com. 246.

(g) Judgm., 16 C. B., N. S. 355—367. See also *Feather v. Reg.*, 6 B. & S. 257; 35 L. J. Q. B. 200; *Dixon v. London Small Arms Co.*, 1 Q. B. D. 384; 1 App. Cas. 632.

(h) See L. R. 2 H. L. 20; 1 C. P. 171; 3 Fost. & Fin. 635. That was an action against the Home Secretary for not submitting to the Sovereign a Petition of Right, under the stat. 23 & 24 Vict. c. 34, s. 2. By that petition the suppliant, in 1361, sought compensation for a series of alleged

wrongs in the course of legal proceedings, beginning in 1834.

In the following cases likewise an action against a Secretary of State was unsuccessful:—*Cobbett v. Grey*, 4 Exch. 729 (although on the general issue the plaintiff had judgment); *Dickson v. Viscount Combermere*, 3 Fost. & Fin. 527; *Grant v. Secretary of State for India*, 2 C. P. D. 445; 46 L. J. C. P. 681; *Kinlock v. Secretary of State for India*, 7 App. Cas. 619; and see *O'Byrne v. Lord Harrington*, 11 Ir. R. C. L. 445.

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officer cannot be made liable in an action at suit of one placed under his orders for the consequences of an act done in the course of duty or of discipline, even though the act complained of were done maliciously to injure. Under circumstances such as supposed investigation may be made by a military (*i*) or naval—not by a common law—tribunal. For instance, a court-martial has jurisdiction to punish a commander who arrests, suspends, and brings to trial his subordinate without a probable cause (*j*). Such a tribunal can better judge of the matter at issue than could a court of common law, and, for reasons already indicated, officers discharging military or naval duties, and requiring from their inferiors prompt and implicit obedience, must be protected.

Nor would an action be maintainable against a Secretary for War for advising the dismissal of an officer by the Crown, unless indeed he were shown to have been actuated by a dishonest or corrupt motive, for an officer receives his commission from his Sovereign and holds it at his pleasure, and it is in the will of the Sovereign to withdraw it. The Sovereign thinks fit, indeed, to exercise that power through responsible servants of the Crown, but they are not responsible for its exercise before a jury (*k*).

The army being regulated by the Regulation of the

(*i*) A witness giving evidence before a military court of inquiry duly assembled, in conformity with the Queen's Regulations is in the same situation as a witness before a judicial tribunal, and all statements there made by him, whether orally or in writing, having reference to the subject of the inquiry, are absolutely

privileged. *Dickson v. Earl of Wilton*, 1 Fost. & Fin. 419; *Dawkins v. Lord Rokeby*, L. R. 7 H. L. 744.

(*j*) 29 & 30 Vict. c. 109, s. 28.

(*k*) Per Cockburn, C. J., *Dickson v. Viscount Combermere*, 3 Fost. & Fin. 585. See also *Grant v. Secretary of State for India*, 2 C. P. D. 445.

Forces Act, 1881 (*l*), and the Army Act, 1881 (*m*) (as continued by the Annual Army Act), together with the Articles of War made in pursuance thereof by the Sovereign (*n*), and the navy being regulated by statutory articles and provisions (*o*), our courts of common law refrain from interfering in cases which concern exclusively the *status* of any member of the service, or the discipline and organisation of the Queen's forces, military or naval.

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In *Barwis v. Keppel* (*p*) the action was brought against the defendant, an officer in the Guards, for maliciously reducing to the ranks the plaintiff, a serjeant in the regiment of which defendant had command. The occurrence complained of took place in Germany, out of the King's dominions, and during a time of war; and *per Curiam* to the counsel in the cause:—"By the Act of Parliament to punish mutiny and desertion, the king's power to make Articles of War is confined to his own

*Barwis v.
Keppel.*

(*l*) 44 & 45 Vict. c. 57.

(*m*) 44 & 45 Vict. c. 58.

(*n*) Sec. 69 of the Army Act of 1881 enacts that "it shall be lawful for Her Majesty to make articles of war for the better government of officers and soldiers, and such articles shall be judicially taken notice of by all judges and in all Courts whatsoever."

(*o*) See 29 & 30 Vict. c. 109, "An Act to make provision for the Discipline of the Navy," amended by 47 & 48 Vict. c. 39.

"In these Articles of the Navy," observes Sir W. Blackstone (Com. 21st ed. vol. i. p. 420) with reference to those formerly in force, "almost every possible offence is set down, and the punishment thereof annexed; in which respect the seamen have much

the advantage over their brethren in the land service, whose Articles of War are not enacted by parliament, but framed from time to time at the pleasure of the Crown. Yet from whence this distinction arose, and why the executive power, which is limited so properly with regard to the navy, should be so extensive with regard to the army, it is hard to assign a reason, unless it proceeded from the perpetual establishment of the navy, which rendered a permanent law for their regulation expedient; and the temporary duration of the army, which subsisted only from year to year, and might therefore, with less danger, be subjected to discretionary government."

(*p*) 2 Wils. 314; *ante*, p. 705.

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dominions; when his army is out of his dominions he acts by virtue of his prerogative (*q*), and without the statute or Articles of War; and therefore you cannot argue upon either of them, for they are both to be laid out of this case, and *flagrante bello* the common law has never interfered with the army—*inter arma silent leges* (*r*). We think, as at present advised, we have no jurisdiction at all in this case.”

In re
Mansergh.

M., a captain in the Queen's service, whilst stationed with his regiment in India, was gazetted to a majority in a regiment then in England. The promotion having been notified by the Commander-in-Chief in the general orders at head-quarters, and also in the regimental orders, M., according to the customs and regulations of the army, ceased to belong to the regiment in which he had been captain. Subsequently M., having written to his former colonel an insubordinate letter, was for that offence tried by court-martial in India, found guilty, and sentenced to be cashiered. The proceedings of such court-martial having been sent to England, and deposited with the Judge Advocate General, a rule was obtained by M. (*s*), calling upon him to shew cause why a writ of certiorari should not issue to bring up, in order that it might be quashed, the record of the conviction, on the ground of want of jurisdiction in the court-martial. The Court of Queen's Bench, however, refused to interfere, Cock-

(*q*) “Where the King of England sendeth a lieutenant or general with an army royal out of the realm, the army is to be guided by the martial law of England.”—2 St. Tr. 570; and see Stephen. Hist. Crim. Law, i. 207.

(*r*) As to the authority of a Prize Court in time of war, see Arg. *Secre-*

tary of State of India v. Sahaba, 13 Moo. P. C. C. 59, where the maxim cited *supra* is applied, and authorities are referred to.

(*s*) *In re Mansergh*, 1 B. & S. 400, recognising *Re Poe*, 5 B. & Ad. 681; see *Re Allen*, 30 L. J. Q. B. 38.

burn, C. J., observing, "Where the civil rights of a person in military service are affected by the judgment of a military tribunal, in pronouncing which the tribunal has either acted without jurisdiction or has exceeded its jurisdiction, this Court ought to interfere to protect those civil rights, *ex. gr.*, where the rights of life, liberty, or property, are involved, although I do not know whether the latter case could occur. Here, however, there was nothing of the sort, and the only matter involved was the military *status* of the applicant—a thing which depends entirely on the Crown, seeing that every person who enters into military service engages to be entirely at the will and pleasure of the Sovereign. Then there is the additional fact that these proceedings originated abroad, in a place the tribunals of which are not subject to our jurisdiction." The learned Chief Justice then proceeded to observe, that, even assuming the Court to have jurisdiction, "yet when we look at the particular nature of the case before us, we see that the military *status* of the applicant alone is affected, and consequently if he had just cause of exception to the act of the tribunal by which he was sentenced, he might have appealed to the Queen to reconsider the matter, with the advice of her Judge Advocate" (t).

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In *Dawkins v. Lord Paulet* (u), the defendant in an action for libel pleaded that he was the superior military officer of the plaintiff, and that the libel complained of

*Dawkins v.
Lord Paulet.*

(t) In the course of the argument of this case Cockburn, C. J., asks: "Does not every person who enters the military service of the Crown give the Crown a right to determine his military *status* at pleasure?" And see *Gibson v. East India Co.*, 5 Bing.

N. C. 262; *Ex parte Sir Charles Napier*, 21 L. J. Q. B. 332; *In re Tufnell*, 3 Ch. D. 164; *Grant v. Secretary of State for India*, 2 C. P. D. 445; 46 L. J. C. P. 681. *Ante*, p. 726.

(u) L. R. 5 Q. B. 94; 39 L. J. Q. B. 53.

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was contained in a report sent by him to the Commander-in-Chief in the course of military duty. To this the plaintiff replied that the acts were done of actual malice, and without reasonable or probable cause. On demurrer to this replication the Court of Queen's Bench held that the reports complained of, being made in the course of military duty, were absolutely privileged, and that no action could be maintained in the civil courts in respect of such purely military matters. From the judgment of the majority of the Court, however, Cockburn, C. J., dissented, holding that the action would lie if the libel was made of actual malice, and without reasonable and probable cause. "Whatever," said the learned Chief Justice (*x*), "may be the right view of this matter with reference to considerations of policy, a grave question appears to me to present itself as to how far a court of law is warranted, in the absence of positive law or previous decision, in refusing redress in a case of admitted wrong, and in which the right of action would otherwise be undoubted, simply because on grounds of public convenience the action, as between the particular parties, ought not to be allowed. The case of judges (*y*) and jurymen seems to me, I must say, very remote. . . . It may be that the immunity afforded to judges and others concerned in the administration of justice, may be essential to that great end. It does not follow that a soldier persecuted or slandered by another shall be left without civil remedy. For my own part I should prefer to treat the immunity of judges as a matter *positivi juris*, as settled by decision and authority, rather than as resting on sound or satisfactory principles, on which were

(*x*) L. R. 5 Q. B. p. 110.

(*y*) See *post*, p. 736.

the matter *res integra* it would be desirable to act. . . .

At all events it seems to me by no means to follow that because such a principle may be required in the interest of the administration of justice it is to be applied, without positive enactment, to wrong inflicted by one member of the land or naval forces of the Crown upon another."

In *Dawkins v. Lord Rokeby*, which was a similar case to the preceding, the Court of Exchequer Chamber (z) again confirmed the principles established by the above cases. Kelly, C. B., in delivering the judgment of the Court, after referring to the immunity to which the defendant was entitled as a witness, observed (a): "But there is another and a higher ground upon which we are of opinion that the defendant is entitled to the judgment of the Court. The whole question involved in the case is a military question, to be determined, as we think, by a military tribunal, and not cognizable in a court of law. . . . The evidence itself was given by the defendant, a military officer, in his military capacity, on a military subject, at the command of his military superior, and concerning the military conduct of another military officer." His lordship then referred to the reasons given by Lord Mansfield, in *Sutton v. Johnstone*, and the other cases above referred to, "all of which," he said, "are authorities to show that a case involving questions of military discipline and military duty alone, is cognizable only by a military tribunal and not by a court of law" (b).

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(z) L. R. 8 Q. B. 255; 42 L. J. Q. B. 63.

(a) L. R. 8 Q. B., at p. 270.

(b) After referring to the eloquent and powerful reasoning of Cockburn, C. J. (*supra*, p. 730) the court expressed satisfaction that the question

was "still open to final consideration before a Court of the last resort." The decision of the House of Lords, however, in *Dawkins v. Lord Rokeby*, was founded entirely upon the immunity to which the defendant was entitled as a witness (see L. R. 7 H. L.

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Save, however, where reasoning such as above presented may be applicable, and in cases specially brought by statute within the cognizance of military law (c), the authority of a court of ordinary civil or criminal (d) jurisdiction is not superseded nor affected by the mere fact that a party brought before it chances to be in the naval or military service of the Crown (e).

In conclusion, a remark by way of caution may be offered. It not unfrequently happens that an officer, naval or military, in the service of the Crown, is appointed governor of a colony or dependency; if so, his position is peculiar, and his liabilities may be regulated by rules which have been stated in the immediately preceding Note.

The governor of a colony or dependency usually, by the terms of his commission, unites in himself several dissimilar though not incompatible characters. He is a

744; 45 L. J. Q. B. 8, *ante*, p. 726, n. (i)), whilst in *Darwins v. Lord Paulet* there was no appeal.

(c) See particularly 29 & 30 Vict. c. 109, s. 101; 44 & 45 Vict. c. 58, ss. 41, 144, 145, 162.

(d) In connection with the criminal law applicable to naval officers may be perused *The Proceedings before the Lords of the Council and the Admiralty in relation to the Trials of Golding and others*, 12 St. Tr. 1270, A.D. 1693: we there read as follows:—"Since the commencement of King William's war, several privateers having been taken and detained in prison, acting by King James's commission, it was resolved, about July, 1692, by the Lords of the Privy Council, that they should be tried as pirates, having no commissions from kings or sovereign powers whatsoever; and accordingly,

about November, 1692, the Lords of the Admiralty ordered Dr. Oldys to proceed against them as pirates; but he declined the doing thereof, and gave his opinion in writing under his hand, that they were no pirates, nor ought to be prosecuted as such." Upon which Dr. Oldys was summoned before the Privy Council, where the matter was discussed by him and other civilians. Finally the accused were tried and convicted.

As to this case, Sir R. Phillimore observes (*Internat. Law*, vol. iii., p. 514, 3rd ed.) that "the reason of the thing must be allowed to preponderate greatly towards the position . . . that these privateers were *jure gentium* pirates."

(e) *Warden v. Bailey*, 4 Taunt. ; *Re Mansergh*, 1 B. & S. 400.

civil governor, at the head therefore of the executive ; he is in command of the local forces ; he exercises, either alone or in conjunction with others, purely judicial functions (*f*). Care, consequently, must be taken when any charge is preferred against him to determine in what capacity he is charged :—is it as a servant or delegate of the Crown ? is it as chief of the executive ? as a naval or military commander (*g*) ? as a judicial officer ? If the charge should seem to be preferred against the governor in either of the three first-mentioned capacities, as chief of the executive, as servant or delegate of the Crown, as exercising naval or military command, considerations have been mentioned which are to guide us in determining his liability. Should it, however, appear that the charge has been preferred in respect of some act done by him judicially, other reasoning must be had recourse to, and other principles must be applied (*h*).

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A leading principle, which may serve to protect an official from liability in respect of an act which has been damaging to another, is indicated by the word “ necessity,” *necessitas non habet legem—quod cogit, defendit*. These are trite maxims, which embody none the less important doctrines. In the *Proceedings against Stratton and others* (*i*) for misdemeanor, in arresting, imprisoning, and deposing Lord Pigot when Governor of Madras, A.D. 1776, we find Lord Mansfield carefully distinguishing (*k*) between two species of necessity, (1) natural and (2) civil or political necessity. Speaking of the former, he says,

(*f*) Tarring, Law relating to Colonies, p. 25.

(*g*) See *Macbeath v. Haldimand*, cited *ante*, p. 711.

(*h*) See Note to *Kemp v. Neville*, *post*.

(*i*) 21 St. Tr. 1046.

(*k*) *Id.* 1223—4, 1230.

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“Wherever necessity forces a man to do an illegal act—*forces* him to do it—it justifies him, because no man can be guilty of a crime without the will and intention of his mind (*l*). An act to be illegal must be voluntary. So if homicide be committed by one who is attacked and in danger, natural necessity will justify it.” Then as to civil, political, or state necessity (*m*), no case, says Lord Mansfield, can occur in this country in which this species of necessity can be vouched in justification of an act such as was then before the court. There is here a regular government to which application may in an emergency be made—there is a superior at hand from whom directions may be asked. But in a remote dependency circumstances might perchance arise which would justify, on the ground of political necessity, that which within the limits of Great Britain could not so be rendered justifiable. Such a necessity must, however, be extreme and imminent; it must spring out of danger threatened to society or to self. Where the defence set up is of this kind, whether it involve a question as to natural or as to political necessity, a jury must decide upon it, the issue raised being one of fact, and of the degree of fact.

From the tenor of Lord Mansfield’s remarks in *Stratton’s Case* and in *Wall v. Macnamara* (*n*) may be deduced the extent of immunity allowed to officers, military or naval, who, whilst acting in that capacity, have caused damage to a private person. *Necessitas publica major est quam*

(*l*) See further, as to this doctrine, Bacon’s Max. V.; *Commonwealth v. Holmes*, 1 Wall, Jun. (U. S.) R. 1; *Reg. v. Dudley*, 54 L. J. M. C. 32.

(*m*) As to which see also Judgm.,

The Fox, 1 Edwards, Adm. R. 306; Judgm., *The Hercules*, 2 Dods. Adm. R. 360. And *ante*, p. 653.

(*n*) Cited *ante*, p. 694.

privata—privatum incommodum publico bono pensatur. NOTE TO
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must be assured, though at the cost of private loss or Liability of
suffering: and imminent danger may warrant most ex-officer *ex*
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treme and stringent measures.

KEMP v. NEVILLE, 10 C. B., N. S. 523 (o).

(24 Vict. A.D. 1861.)

LIABILITY OF A JUDICIAL OFFICER.

A judicial officer is not liable to be sued for an adjudication according to the best of his judgment upon a matter within his jurisdiction: and a matter of fact so adjudicated by him cannot be put in issue in an action against him.

Declaration. The declaration in this case charged that the defendant caused an assault to be made on the plaintiff, and caused her to be unlawfully imprisoned and kept in a certain gaol or place of confinement called the Spinning House in Cambridge, and also caused the plaintiff to be forced to take from her person the clothes which she was then wearing, and caused her said clothes to be taken away from her, and caused her to be forced to put on certain other clothes of an inferior quality, and caused the plaintiff to be in the said gaol or place of confinement forced to work and labour; whereby the plaintiff was greatly hurt, and injured and damnified in her reputation; and other wrongs to the plaintiff the defendant did: claim 500*l*.

1st Plea. The defendant pleaded,—first, not guilty.

2nd Plea. Secondly; that the chancellor and scholars of the University of Cambridge, from time immemorial until the passing of the Stat. 13 Eliz. c. 29, were a body corporate by the name of The Chancellor, Masters, and Scholars of the University of Cambridge, and that by the said Act it was enacted that the then chancellor of the said university and his successors for ever, and the masters and scholars of the same university for the time being should be incorporated and have perpetual succession by

the name of The Chancellor, &c.; that the office of proctors of the said university is, and from time immemorial was, an ancient office, and that the persons for the time being duly holding such office have, and each of them hath, during all the time aforesaid, by custom of and in the said university from time whereof the memory of man is not to the contrary there used and approved, for the preservation of good order and morality amongst the scholars of the said university, visited, and been used and accustomed and of right ought to visit, all and every the public streets and places in the town of Cambridge, and within the precincts of the said university, at all times of the day and night, and have and each of them hath been used and accustomed, and of right ought, to arrest and apprehend all such women as, in such their visits, they or either of them have or hath found within the limits and precincts aforesaid, who, upon reasonable grounds, have been suspected by the said proctors or either of them to be loose or disorderly women, or who within the limits and precincts aforesaid have been found keeping company with any of the scholars aforesaid in such manner and under such circumstances as upon reasonable grounds to be by the said proctors or either of them suspected of evil, and to take such persons so arrested and apprehended before the vice-chancellor of the said university for the time being, to be dealt with according to law: That the office of vice-chancellor is, and from time immemorial was, an ancient office of the said university; and that, before and at the time of committing the alleged grievances in the declaration mentioned, the defendant was the vice-chancellor of the said university; and that, from time whereof, &c., until the passing of the said Act, upon any such women having been so arrested and apprehended and taken before the vice-chancellor of the said university for the time being as aforesaid, the said vice-chancellor for the time being has by custom of and in the said university from time

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whereof, &c., heard and examined all such women so apprehended and arrested as aforesaid, and, upon being satisfied that such women have then been proved to be loose or disorderly women, or have been found within the limits and precincts aforesaid keeping company with any of the scholars aforesaid, in such manner and under such circumstances as aforesaid, has, whenever to him hath seemed meet, caused such women to be punished by imprisonment of their bodies for such reasonable time, and in such convenient prison, and subject to such usual and reasonable discipline, as to the said vice-chancellor for the time being hath seemed meet: That, before and at the time of the alleged grievances, and after the passing of the said Act and of the Cambridge Award Act, 1856 (19 & 20 Vict. c. xvii), one Thomas Samuel Woollaston lawfully held and exercised the said office of proctor: That the said Thomas Samuel Woollaston, being such proctor as aforesaid, shortly before the committing of the alleged grievances, found the plaintiff within the limits and precincts aforesaid, in one of such his visits as aforesaid; and that the plaintiff then and until after the committing of the alleged grievances was a woman who upon reasonable grounds was suspected by the said Thomas Samuel Woollaston to be a loose and disorderly woman, and who then was found within the limits and precincts aforesaid, keeping company with divers scholars of the said university in such manner and under such circumstances as that she the plaintiff then and until after the committing of the alleged grievances was on reasonable grounds by the said Thomas Samuel Woollaston suspected of evil: Whereupon the said Thomas Samuel Woollaston, so being such proctor as aforesaid, before the committing of the alleged grievances, had arrested and apprehended the plaintiff in order to take her and had then taken her before the defendant, so being such vice-chancellor as aforesaid, to be dealt with according to law; and thereupon the defen-

dant, so being such vice-chancellor as aforesaid, did then and there hear and examine the plaintiff, and was thereupon satisfied that the plaintiff then was a loose and disorderly woman, and then had been found by the said Thomas Samuel Woollaston, so being such proctor as aforesaid, within the limits and precincts aforesaid, keeping company with divers scholars of the said university for idle, disorderly, and immoral purposes, and did then cause the plaintiff to be punished by imprisonment of her body for a reasonable time in that behalf, to wit, for five days, in the place of confinement in the declaration mentioned, being a fit and convenient place in that behalf: And that the compelling the plaintiff to take off the clothes as in the declaration mentioned and compelling her to put on the said other clothes, and to wear the same, and to work and labour, as in the declaration mentioned, then were and each of them was a part of the reasonable discipline of the said place of confinement then used and approved of by the defendant, so being such vice-chancellor as aforesaid; which were the several grievances in the declaration alleged.

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Thirdly,—that the chancellor, masters, and scholars of the University of Cambridge, at the time of the granting of the letters-patent thereafter in part set forth, were a body politic, &c., as in the introductory part of the second plea mentioned, and that Elizabeth then Queen of England, &c., on the 26th day of April, in the third year of her reign, by her Majesty's letters-patent did, for herself, her heirs and successors, grant to the then chancellor, masters, and scholars of the said university and their successors, that it should be lawful for the aforesaid chancellor, &c., by themselves or by their deputies, officers, servants, and ministers, or by any one or more of them, from time to time and at all times, as well by day as by night, at their good pleasure, from thenceforth to make scrutiny, search, and inquiry, as well by night as by day, as often and whensoever it should seem to them

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expedient, in the aforesaid town of Cambridge, and in the suburbs of the same, and other places in the said letters-patent mentioned, of and for all common women, vagabonds, and other persons suspected of evil coming to or assembling at the aforesaid town and suburbs, and other places, or any of them, and all and every the persons which the same chancellor, &c., or their deputies, &c., upon any such scrutiny, search, or inquiry, should find guilty or suspected of evil, to punish by imprisonment of their bodies, banishment, and otherwise, as to the chancellor of the said university or his vice-chancellor, for the time being should seem fit, without impeachment, molestation, disturbance, or grievance of her the said Queen Elizabeth, her heirs or successors, or any of them, any statute notwithstanding; and which letters-patent the said then chancellor, &c., duly accepted: That, by the Act in the second plea mentioned, it was enacted as in that plea mentioned: and it was in and by the same Act, amongst other things, further enacted that the letters-patent as aforesaid should from thenceforth be good, effectual, and available in the law to all intents, constructions, and purposes, to the aforesaid then chancellor, &c., and to their successors for ever, as amply, fully, and largely as if the same letters-patent had been repeated verbatim in the said Act: That, before the committing of the alleged grievances, Thomas Samuel Woollaston and Edward William Blore, then being officers and servants of the said chancellor, &c., and by their command, having, upon a certain such scrutiny, search, and inquiry in the aforesaid town and suburbs of Cambridge, found the plaintiff and divers other women assembled together in a certain carriage in company with certain scholars of the said university, in a certain public street in the said town, and then reasonably suspecting the said plaintiff of evil, that is to say, of being in company with the said scholars for idle, disorderly, and immoral purposes, had, as such officers

and servants, and by such command, arrested and apprehended the plaintiff, and brought her before the defendant, then being the vice-chancellor of the said university, in order for her examination touching and concerning the premises, the said defendant then being the proper officer and deputy of the said chancellor, masters, and scholars in that behalf: Whereupon the defendant: [*Conclusion as in Plea 2*].

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The plaintiff joined issue on the first plea. To the second plea she replied as follows:—The plaintiff, as to the defendant's second plea, admits the statute in that plea mentioned, and that it was enacted by the statute therein first mentioned as in that plea alleged; and for replication to the said second plea the plaintiff takes issue upon the residue thereof. There was a similar replication to the third plea.

Replication.

The cause was tried before Erle, C.J., at Westminster, when the facts which appeared in evidence were as follows:—The plaintiff was a milliner and dress-maker residing with her mother, a widow, and, so far as appeared, a person of irreproachable character. The defendant was master of Magdalene College, Cambridge, and at the time when the transactions in question took place was vice-chancellor of the university, and also *virtute officii* a magistrate for the borough of Cambridge.

Evidence
for the
plaintiff.

In the latter part of January, 1860, the plaintiff, with several other young women, also resident in Cambridge, were invited to an evening party which was proposed to be given, at a village near Cambridge, by some undergraduates, members of the university. Information of what was going on having by some means reached one of the pro-proctors of the university, that gentleman consulted the senior proctor, and they with their assistants proceeded to Parker's Piece, in Cambridge, where they stopped the carriage in which the plaintiff and her friends were, and took it to the Spinning House, a building in Cambridge, which has for many years past been used

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Evidence
for the
plaintiff.

by the university as a place for confining persons apprehended by the proctors and sentenced to imprisonment by the vice-chancellor for street-walking within his jurisdiction. Arrived at the Spinning House, the plaintiff and her companions were taken into a room adjoining the entrance-hall, in which were the two proctors, who asked the plaintiff her name, address, and occupation, which she gave. The plaintiff was then placed by the matron in a separate cell; and, after being detained there for about half an hour, she was taken back to the room first mentioned, where she found the defendant and the proctors. The defendant then asked her several questions which she answered. She then asked the defendant if he would allow her to refer for her character to certain ladies in the town for whom she worked. Her request, however, was unheeded; and the defendant sentenced her to be imprisoned in the Spinning House for fourteen days.

The place of confinement was described by the plaintiff and her witnesses to be cold and damp. The plaintiff's clothes were taken from her by the matron, and a prison dress substituted for them. She was not, however, detained longer than the fifth day, when in consequence of representations made to the defendant by some persons to whom she and her mother were known, she was discharged.

The plaintiff further proved that there was no examination of any witnesses upon oath in her presence; nor was she aware of any warrant of commitment having been drawn up (*p*).

Defence.

The defence was based upon the charter granted to the university by Queen Elizabeth in the third year of her

(*p*) It appeared that no regular warrant had been prepared at the time, though one was produced at the trial, when it was stated that there had been an informal warrant, origi-

nally. The whole case, however, proceeded on the assumption that there had been no warrant. See *post*, pp. 743, 745, 746, 747.

reign, and confirmed by the statute 13 Eliz. c. 29, the 8th section of which charter provided, amongst other things, that "it shall be lawful for the vice-chancellor and his successors, by themselves and by their deputies and servants from time to time, as well by night as by day, at their pleasure, to make scrutiny, search, and inquiry in the town of Cambridge and in the suburbs *for all common women, vagabonds, and other persons suspected of evil* (q), coming into the town:" and then the charter went on to say that all persons who upon such search shall be found guilty or suspected of evil, they may imprison by their bodies as they shall think fit (r).

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Defence.

The defendant and the proctor were examined: and the latter justified his suspicion of the intention of the parties by the circumstances under which they were found and apprehended.

It was also proved that the Spinning House was the usual place of imprisonment of the university, and was subject to the regulation of the secretary of state, and visitation of the government inspector.

The contention on the part of the plaintiff at the trial was, that the charter did not justify the arrest and incarceration of the plaintiff, there being nothing to show that she was a person of loose or immoral character, or that she had been guilty of any offence punishable by law; that the proceeding before the vice-chancellor, no witnesses being called to prove the charge alleged against the plaintiff, and no opportunity being offered to her to defend herself, was oppressive and illegal; and that her commitment without warrant was a gross and unconstitu-

Argument
for the
plaintiff at
trial.

(q) "*De et pro omnibus et publicis mulieribus, pronubis, vagabondis, et aliis personis de malo suspectis, ad dictam villam et suburbia, ferias, mercatus, nundinas, et loca prædicta, seu ad eorum aliquem venientes seu confluentes.*"

(r) "*Ac omnes et singulas illas personas quas iidem cancellarius, magistri, &c., super aliquod hujusmodi scrutinium, scrutationem, sive inquisitionem, reas seu suspectas de malo invenerint.*"

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Argument
for the
plaintiff
at trial.

tional violation of the law. It was further contended that the Spinning House was not a fit and proper gaol for the vice-chancellor to commit to; and that the depriving the plaintiff of her clothes, and substituting the prison garb, was an unreasonable and improper violation of the liberty of the subject. It was, however, admitted by the plaintiff's counsel that the vice-chancellor had, throughout the proceedings complained of, acted *bonâ fide* and according to the best of his judgment and discretion.

Argument
for the
defendant
at trial.

On the part of the defendant, it was submitted, that assuming the evidence given on the part of the plaintiff to be true, it sustained all the material allegations in the defendant's pleas; and that the vice-chancellor, having acted throughout in the capacity of judge of a court of record, and having as such adjudicated to the best of his judgment upon a matter within his jurisdiction, brought before him for judicial determination, no action could be maintained against him in respect of anything so done by him however mistaken he might have been in respect either of fact or of law.

Questions
submitted
to the jury.

The learned judge, reserving leave to the defendant to move to enter a verdict for him upon the above ground, summed up, elaborately reviewing the facts and the arguments urged on the one side and on the other, and concluded by leaving three questions to the jury,—1st, whether the proctors and the vice-chancellor had reasonable cause of suspicion that the plaintiff was in company with the undergraduates for idle, disorderly, and immoral purposes;—2ndly, whether the vice-chancellor duly heard and examined the plaintiff;—3rdly, whether the place of imprisonment and treatment of the plaintiff therein were proper and reasonable.

Findings

The jury found that the proctors had reasonable cause for suspicion; and, in respect of the hearing and examination of the plaintiff, that the defendant had not made due inquiry into her character, and that the punishment

was undeserved: but that the complaint of the prison and the treatment therein was unfounded.

Upon this finding, his lordship directed a verdict to be entered for the plaintiff. The damages were assessed at 40s.

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Entry of
verdict.

Edwin James, Q.C., moved, on behalf of the plaintiff, for a new trial on the ground of misdirection on the part of the learned judge in telling the jury that a warrant in writing for the commitment of the plaintiff was not necessary (s); and also in the construction put upon the charter (as to which he submitted that "persons suspected of evil" did not mean "persons who had placed themselves in such a position that their acts might result in 'evil,'" but "persons whose previous conduct and character rendered them objects of reasonable suspicion," which was not pretended to be the case with the present plaintiff); and in omitting to tell the jury that there was no legal hearing and examination of the plaintiff by the defendant before her commitment (as to which he submitted that every hearing must be conducted according to known legal principles, the witnesses in support of a charge being examined in the presence of the accused,—a right recognized by the 2nd section of the Prisoners' Counsel Act, (6 & 7 Will. 4, c. 114), and *The King v. Crowther* (t); and also in omitting to tell the jury that the gaol in question was a private gaol, and that the defendant had no right to commit the plaintiff thereto.

Motion for
plaintiff.

The Court suspended its decision upon this motion until the defendant should have moved to enter the verdict for him pursuant to the leave reserved to him at the trial.

Sir Fitzroy Kelly, Q.C., afterwards moved, on the part of the defendant, for a rule to shew cause why the verdict should not be entered for him upon the above finding.

Cross motion for
defendant.

(s) *Ex parte Gray*, 2 D. & L. 539.

(t) 1 T. R. 125.

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CROSS MOTION
FOR
DEFENDANT.

He submitted that the imprisonment complained of was a judicial act by the defendant, a judge of a court of record, acting *bonâ fide* in a matter in which he had jurisdiction, and therefore not the subject of an action, even though he erred in point of fact or of law, or had been wanting in prudence or discretion (*u*).

Upon these motions the rule was drawn up as follows :—

Rule nisi.

It is ordered that the plaintiff shall shew cause why the verdict should not be set aside, and a verdict be entered for the defendant, pursuant to leave reserved, on the grounds,—1st, that the defendant acted as a judge and is not liable to an action ;—2ndly, that the finding of the jury, except where in favour of the defendant, is immaterial: the said plaintiff being at liberty, on such cause being shewn as aforesaid, to raise any points contended for by the plaintiff on the motion already made to the Court on behalf of the said plaintiff,—each of the said parties being at liberty to appeal on all questions fit for the Court of Error: And it is further ordered, that, at the time of such cause being shewn as aforesaid, the said plaintiff shall be at liberty to insist,—1st, that the judge presiding at the said trial misdirected the jury in holding that a warrant in writing was not necessary ;—2ndly, that the said judge put a wrong construction upon the charter ; 3rdly, that he ought to have told the jury that there was no legal hearing or examination by the vice-chancellor ;—4thly, that he ought to have told the jury that the prison in question was a private gaol, and that the vice-chancellor had no right to commit to it: the said plaintiff to be in the same position as to setting aside the said verdict found in this cause, or appealing to the Court of Error, as though a separate rule had been granted

(*u*) He referred to *Groenvelt v. Burwell*, 1 Salk. 200, 396, S. C. 3 Salk. 354 ; 12 Mod. 386 ; Holt, 184, 395 ; 1 Lord Raym. 213, 454 ; Carth.

491 ; *Hamond v. Howell*, 1 Mod. 184, S. C. 2 Mod. 218 ; *Garnett v. Ferrand*, 6 B. & C. 611 : and *Ex parte Death*, 18 Q. B. 647.

by the Court to the said plaintiff on the grounds above-mentioned.

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Arguments
on rule.

Lush, Q.C., Welsby, and Couch, in Easter Term, 1861, shewed cause. They submitted, that the legal effect of the finding of the jury was, a negation of the material part of the third plea, to sustain which it was essential for the defendant to shew that he had duly heard and examined and was satisfied of the guilt of the accused (*x*); that there cannot legally be an imprisonment without a record or a conviction and a warrant (*y*), which warrant must exist at the time, and cannot be drawn up afterwards (*z*), though a conviction may: that the charter granted by Queen Elizabeth to the university, or the statute which confirmed it, did not invest the vice-chancellor with the authority of a judge of a court of record, nor was the plea framed on that supposition: that, though ordinarily none but a court of record can punish by fine and imprisonment (*a*), yet the mere power to fine and imprison does not *per se* constitute a court of record; and that the Spinning House was not a legal place of imprisonment (*b*).

Sir Fitzroy Kelly, Q.C., O'Malley, Q.C., and Denman, Q.C., in support of the rule contended in substance as follows:—That the defendant was entitled to a verdict upon the evidence as it stood at the close of the plaintiff's case; that the vice-chancellor acted as a judge of a court of record, though with a limited jurisdiction, and was protected in all he did; and that the objections urged on

(*x*) *R. v. Simpson*, 1 Stra. 44; *Capel v. Child*, 2 C. & J. 558; *per* Lord Tenterden, C. J., *Basten v. Carew*, 3 B. & C. 649, 652.

(*y*) See Paley on Convictions, 6th ed. 337; 1 Hale P. C. 583; *R. v. Beck*, 1 Stra. 127; *per* Yates, J., *Strickland v. Ward*, 7 T. R. 631, n., 633, n.; *Ex parte Bassett*, 6 Q. B. 481; *R. v. Nesbitt*, 2 D. & L. 529;

Prickett v. Gratrex, 8 Q. B. 1020.

(*z*) *Fabrigas v. Mostyn*, 1 Cowp. 161; *Hutchinson v. Lowndes*, 4 B. & Ad. 118.

(*a*) *Dr. Bonham's Case*, 8 Rep. 107; *Beecher's Case*, Id. 160, b.

(*b*) Bacon, Abridgment, Gaol and Gaolers (A); and see stats. 23 Hen. 8, c. 3, and 5 & 6 Will. 4, c. 38.

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the part of the plaintiff were void of foundation (c): That the finding that the vice-chancellor did not make due inquiry as to the plaintiff's character of the persons to whom she referred, was altogether idle and immaterial; for that, assuming he was wrong in this respect, it would amount to nothing more than an improper rejection of evidence, which never could be suggested to form a ground of action against the judge: That, as to the warrant, if necessary, the existence of a valid warrant at the time would be presumed, and that at all events, the formal warrant afterwards drawn up was sufficient: That, as to the prison, if that was a question for the jury, they had disposed of it by finding that it was a reasonably fit and proper place, and, if a question of law, the evidence shewed it to be a legal one (d): And that the mere commitment to a wrong gaol was not the subject of an action (e).

Cur. adr. vult.

Judgment.

ERLE, C. J., delivered the following judgment of the Court (f):—

In this case it has been contended, on behalf of the defendant, that the rule to enter a verdict for him should be made absolute, either on the leave reserved at the trial

(c) *Gwinne v. Poole*, 2 Lutw. 935, 1560; *Groenvelt v. Burwell*, 1 Salk. 200, S. C. 1 Lord Raym. 454; Carth. 491; *Godfrey's Case*, 11 Rep. 42; *The Case of Conspiracy (Floyd v. Barker)*, 12 Rep. 23; *Bushell's Case*, 1 Mod. 119; *Hamond v. Howell*, 1 Mod. 184, S. C. 2 Mod. 218; *Fabrigas v. Mostyn*, 1 Cowp. 161; *Culder v. Halkett*, 3 Moo. P. C. C. 28; *Taafe v. Lord Downes*, 3 Moo. P. C. C. 36, n.; *Doswell v. Impey*, 1 B. & C. 163; *Dicas v. Lord Brougham*, 6 C. & P. 249; *Case of the Marshalsea*, 10 Rep. 618, b.; *Houlden v. Smith*, 14 Q. B. 841; *Garnett v. Ferrand*,

6 B. & C. 611; *Tozer v. Child*, 7 E. & B. 377; *Cave v. Mountain*, 1 M. & G. 257; *Hutchinson v. Lowndes*, 4 B. & Ad. 118; *Ackerley v. Parkinson*, 3 M. & S. 411; *R. v. Barker*, 1 East, 186; *Massey v. Johnson*, 12 East, 67, 82; *Gray v. Cookson*, 16 East, 13; *Brittain v. Kinnaird*, 1 Brod. & B. 432; S. C. 4 J. B. Moore, 50; Hawk. P. C. Book 2, c. 16, §§ 3, 12; 2 Bla. Com. 24, 25.

(d) *Smith v. Hillier*, Cro. Eliz. 167; *Ex parte Evans*, 8 T. R. 172.

(e) Com. Dig. Imprisonment (B).

(f) Erle, C. J., Willes, Byles, and Keating, JJ.

upon the close of the plaintiff's case, or on the finding of the jury; and we are of opinion that he is entitled to succeed on each of these grounds.

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Judgment

The declaration was for imprisonment.

The plea set out the charter, which empowered the university, by their officers, to make search in the town of Cambridge for common women and other persons suspected of evil, and all such persons as they should, upon such search, find guilty or suspected of evil, to punish by imprisonment or otherwise as to the chancellor or vice-chancellor shall seem fit. The plea then proceeded to allege that the charter aforesaid had been confirmed by statute as fully as if it had been repeated verbatim therein; and that the proctors, by command of the university, on a search in Cambridge, found the plaintiff and other women assembled in a carriage, in company with some scholars of the university, and then reasonably suspecting the plaintiff of evil,—that is, of so being in company with the said scholars for idle, disorderly, and immoral purposes,—apprehended the plaintiff, and brought her before the defendant, the vice-chancellor, in order for her examination touching the premises; whereupon the defendant did hear and examine the plaintiff, and was satisfied of the matters aforesaid, and caused her to be punished by imprisonment in a fit and proper place of confinement.

The replication admitted the statute, and took issue upon the rest of the plea.

The plaintiff in her evidence stated that she had been apprehended under the circumstances alleged in the plea, and brought before the vice-chancellor by the proctors, and that the vice-chancellor made inquiries of her respecting the said circumstances, and heard her answers and her request that reference might be made to some persons for her character, and then pronounced sentence of imprisonment for fourteen days in the Spinning House, where she was subjected to the treatment complained of in the declaration, the same being, as far as appeared, the usual

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—
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course. She also stated that she had no disorderly or immoral purpose ; that the charge was not made, and the witnesses were not examined in her presence : that no inquiry was made of the persons to whom she had referred for her character ; that there was no examination of any one upon oath ; and that there was no warrant of commitment, as far as appeared to her.

The other witnesses of the plaintiff corroborated these statements, and added nothing that is relevant to the present inquiry.

An admission was made by the plaintiff's counsel, that the defendant, as vice-chancellor, had, throughout the proceedings complained of, acted according to the best of his judgment and discretion.

The counsel for the defendant thereupon contended, that, on the assumption of this evidence being true, all the material allegations in the plea, which were put in issue by the replication, were proved thereby ; that there was no question of fact for the jury, and that therefore they ought to be directed to give their verdict for the defendant.

The substance of the contention was, that this evidence proved that the vice-chancellor acted throughout in the capacity of judge, holding office under the charter, and adjudicating, according to the best of his judgment, upon a question within his jurisdiction, brought before him for judicial determination ; and that, if this was true in fact, it followed that in law no action of trespass could be sustained against him, as judge, for anything so done by him in that capacity, although there might be a mistaken opinion in respect either of fact or of law.

Upon this point leave was reserved to the defendant to move to enter the verdict for him.

In pursuance of this leave, this rule was obtained ; and, after careful attention to the arguments and authorities, we have come to the conclusion that it should be made absolute.

We are of opinion, that, as the charter in express terms

invests the vice-chancellor with authority to punish, by imprisonment or otherwise as he should think fit, he thereby became invested with judicial authority, and a judge of record, and entitled to all the protection attached by law to the judicial office; and, although it does not appear to us to be essential for the defence to rely on his being a judge of a court of record, we are of opinion, that, when he was so empowered, he thereby became a judge of a court of record, entitled to the protection attached by law to that office. One important practical consequence resulting from the vice-chancellor being considered as a judge of a court of record is this, that the proceedings before him can be proved or disproved by the record thereof only, which record may be made up at any time, whenever it may become necessary to establish an issue duly raised.

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Judgment.

In the present case, the plaintiff took issue upon the facts tried by a jury, and did not take any issue upon the record of the alleged proceedings, which would be properly triable by the court upon inspection of the record after it had been brought here by *certiorari*.

We are further of opinion that the jurisdiction to hear and determine and pass sentence of imprisonment attached when the proctors, being officers of the university, brought before the vice-chancellor for adjudication a person found by them in Cambridge, and apprehended by them there as being a person suspected of evil, within the meaning of the charter; that, as the charter defines no form of proceeding, either for the hearing, or the determination, or the committal, an action of trespass could not be sustained for any of the judicial acts complained of. The authorities support this opinion.

The case of *Groenvelt v. Burwell (g)*, bears a strong analogy to the present. There, the declaration was for false imprisonment. The justification showed that a

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charter of Henry VIII., confirmed by statute, invested the censors of the College of Physicians with authority to supervise all physicians practising medicine in London, and to punish them for bad practice, by fine and imprisonment; that the plaintiff used the faculty of medicine in London, and attended a patient, and treated her unskilfully; that a complaint was made to the censors, who inquired into it, and heard witnesses and the plaintiff, and adjudged him guilty of bad practice, and sentenced him to imprisonment. The plaintiff argued that the plea was bad because it did not shew sufficient jurisdiction in the censors. But Holt, C. J., delivering the judgment of the Court, decided that the censors had entitled themselves to a sufficient jurisdiction,—first, over the person of the plaintiff, because he had practised in London,—secondly, over the subject matter, viz., the unskilful administration of physic,—thirdly, over the fact for which he was punished, because it was committed within the jurisdiction, viz., in London: and he goes on to say, that, where a man has jurisdiction over another man in all these particulars, it is apparent, that, whether the matter of fact be such as is alleged or not, it is not traversable, but the plaintiff is concluded. This judgment applies to the plea now in question. The vice-chancellor has the same power of adjudication over the persons apprehended in Cambridge by the proctors, as the censors had over persons practising medicine in London; also the same power over the subject matter, viz., the liability of the plaintiff to be apprehended on the ground stated in the plea, as the censors had over the unskilful administrators of physic; also the same power in respect of the place, viz., Cambridge, as the censors had in respect of London. Lord Holt further says that the fact of which the plaintiff is convicted is not traversable, because the authority of the defendants is absolute to hear and determine the offence, and that persons who are judges by law shall not be liable to have their judgments examined in

actions brought against them. He further shows, by authorities, that a jurisdiction to fine and imprison, created by statute, is a court of record. Upon these principles, he answers all the objections made in that case to the course of proceeding, and, among others, the objection that the witnesses had not been examined on oath.

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The rule that a judicial officer cannot be sued for an adjudication according to the best of his judgment upon a matter within his jurisdiction, and also the rule that a matter of fact so adjudicated by him cannot be put in issue in an action against him, have been uniformly maintained. We shall, therefore, only refer shortly to some other cases shewing the variety of occasions on which these rules have been applied: and we begin with the justly celebrated judgment of Powell, J., in *Gwinne v. Poole* (*h*). There, the defendant was held not to be liable in trespass, although, as judge of an inferior court, he had caused the plaintiff to be arrested in an action where the cause of action arose out of his jurisdiction; and, although the *capias* was issued without previous summons, and was not made returnable at a certain time, yet he was justified because he acted as judge in a matter over which *he had reason to believe* that he had jurisdiction. In *Floyd v. Barker* (*i*), the judge and the grand jury were held not liable to be sued in the Star-Chamber for a conspiracy in respect of their acts in Court, in convicting of felony. In *Hamond v. Howell* (*j*), the judge who committed for an alleged contempt, under a warrant shewing that in truth no contempt had been committed, was held not liable in trespass, because he had jurisdiction over the question, and his mistaken judgment, together with the void warrant founded thereon, was no cause of action. In *Cave v. Mountain* (*k*), the

(*h*) 2 Lutw. 1560.

(*i*) 12 Rep. 23.

(*j*) 2 Mod. 218.

(*k*) 1 Scott N. R. 132; S. C. 1 M.
& G. 257.

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justice who committed the plaintiff on an information which contained no legal evidence either of any offence or of the plaintiff's participation in that which was supposed to be an offence, was held not to be liable in trespass, because the information was considered to be directed against an offence over which the justice had jurisdiction, if there had been any proof thereof. In *Metcalfe v. Hodgson* (l) the defendant was held not liable for taking insufficient bail in a cause in a local Court, because in that Court it was a judicial act by him. In *Garnett v. Ferrand* (m) the coroner who removed the plaintiff from the place of an inquest was held not liable in trespass, as the removal was ordered by him in a judicial capacity. In *Tozer v. Child* (n) the churchwarden was held not liable for refusing a lawful vote in a vestry, because, although he was acting partly in a ministerial capacity in receiving the votes, yet he was also acting partly in a judicial capacity in refusing a vote, and in that capacity he was not liable for a mistake, if he acted according to the best of his judgment. In *Calder v. Halket* (o) the magistrate having jurisdiction over Asiatics in Bengal, but not over Europeans, was held not liable in trespass for an apprehension of the plaintiff under a warrant issued by him, he not knowing the plaintiff to be European. The Privy Council say that trespass will not lie for a judicial act without jurisdiction, unless the judge had the means of knowing the defect of jurisdiction: and it lies on the plaintiff in every case to prove that fact. In *Houlden v. Smith* (p) the judge of the County Court was held liable in trespass because he was within the exception thus laid down, and had the means of knowing that he had no jurisdiction. In *Taafe v. Lord Downes* (q) the judge was justified by a

(l) Hutton, 120.

(m) 6 B. & C. 611.

(n) 7 E. & B. 377.

(o) 3 Moo. P. C. C. 28.

(p) 14 Q. B. 841.

(q) 3 Moo. P. C. C. 36, n.

plea in trespass shewing a warrant issued by him in his capacity of judge, although the plea did not shew that the warrant was lawful, but was purposely confined to the right of a judge to protection.

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Throughout these cases, and many others, the vital importance of securing independence for every judicial mind is earnestly recognised. The principle applies in its full extent to the judicial duty to be performed by the vice-chancellor, and he is therefore entitled to the same protection. As the defendant had jurisdiction in respect of the matter, and the person, and the place, it does not appear to us to be essential to rely on his being a judge of a court of record; but we add some further authorities shewing that the power to imprison made him a judge of record.

The statute of Westminster II. empowered certain auditors to imprison bailiffs who should be in arrear in their accounts. Lord Coke says by this Act the auditors are judges of record (r). In *Godfrey's Case* (s) it is said no Court can fine or imprison which is not a court of record. In *Beecher's Case* (t) it is said, *Nulla curia que recordum non habet potest imponere finem, neque aliquem mandare carceri, quia ista spectant tantummodo ad curias de recordo*. In the report of *Groenvelt's Case*, under the name of *Dr. Grenville v. The College of Physicians* (u), it is said, that, wherever there is a power *de novo* created by parliament to fine and imprison, either of these two makes it a court of record. Although in *Dr. Bonham's Case* (x) the same principle is not affirmed; yet all that Lord Coke says there extrajudicially, after deciding that the action lay, has been doubted by Lord Holt in *Groenvelt's Case*, and attributed to the desire of Lord Coke to support a graduate of Cambridge, and to prevent what

(r) 2 Inst. 380.

(s) 11 Rep. 43, b.

(t) 8 Rep. 58.

(u) 12 Mod. 388.

(x) 8 Rep. 107.

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he considered an affront of the university, which must be venerated.

The plaintiff's counsel, in shewing cause against this rule, relied mainly on objections in relation either to the hearing, or the warrant, or the prison; and we proceed to advert to each of them in their order.

In respect of the hearing, it appeared that the plaintiff stated what she chose in answer to inquiries concerning the charge; that the vice-chancellor received information from the proctors without oath; and that the persons to whom the plaintiff referred were not sent for. As to the inquiries addressed to the plaintiff, they seem to us to be reasonable, in order to give her an opportunity of answering or explaining the facts. After hearing her answers, the vice-chancellor might with reason be satisfied that the facts existed on which the proctors acted, and was justified in adjudicating thereon. As to receiving information not upon oath, there is no express provision in the charter enabling the vice-chancellor to administer an oath; and the cases shew that it was not for this purpose essential to do so. In *Dr. Groenvelt's Case*, the objection was made; but Lord Holt was clear that the omission to hear evidence upon oath would not make the defendant liable in trespass (*y*). In *Baston v. Carew* (*z*) the objection was made that the magistrates, acting judicially, must proceed on evidence given under the sanction of an oath; but the court decided against it, and held, that, where the statute creating the jurisdiction did not direct the justices to make inquiry upon oath, the Court could not require it to be done (*a*). In that case, the statute related to vacant possession, to be ascertained in great measure by personal inspection, and so within the knowledge of the justices. The jurisdiction

(*y*) 1 Ld. Raym. 472.

(*z*) 3 B. & C. 649.

(*a*) See *Ex parte Ramshay*, 18 Q.

B. 173, 196; S. C. 21 L. J., Q. B. 238.

here in question relates to matters supposed to come within the observation of the officers of the university, upon a search properly made by them, and also supposed to require a summary interference on their part. Unless the legislature had expressly declared it, we should not presume an intention to make evidence upon oath essential for this purpose. With respect to the objection that the defendant did not send to the persons referred to by the plaintiff for her character, he was not under any legal obligation so to do; it was a matter for his own discretion; and, if he acted therein according to the best of his judgment, as it was admitted that he did, his omission to make this inquiry was no ground for maintaining trespass. We must add, that it would in our opinion be most inconvenient and objectionable that the validity of judicial proceedings should depend on the opinion of a jury whether there had been a sufficient hearing of the parties: and, indeed, as we have already observed (b), the question whether there has been such a hearing, must, in the case of a court of record, be decided conclusively by the record itself.

With respect to the warrant, it was proved that a writing was made when the plaintiff was committed; but that writing was not produced by the defendant when called for, after notice to produce: and we assume that it was void as a warrant. We have before observed, that, in *Hamond v. Howell* (c), the warrant was void on the face of it: so it was in *Groenvelt v. Burwell*; for, in each case, the prisoner had been discharged by *habeas corpus*: nevertheless, the action did not lie in either: therefore, if a void warrant is the same as no warrant, the absence of a warrant would not sustain an action. We would further observe that all judges of record have power to commit to the custody of their officer, *sedente curiâ*, by oral command, without any warrant made at the

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(b) *Ante*, p. 751.

(c) 2 Mod. 218.

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time (*d*). This proceeds upon the ground that there is, in contemplation of law, a record of such commitment, which record may be drawn up when necessary: *Throgmorton v. Allen* (*e*); and see the judgment of Parke, B., in *Watson v. Bodell* (*f*). Indeed, for a like reason, no warrant is required for the execution of a sentence of death (*g*).

The rule thus established seems peculiarly applicable to the case of a committal to the gaol appropriated to the Court, as in the present case. A warrant seems no more necessary or useful, under those circumstances than would a written authority be from the keeper of the gaol to the warder who locks up the cell. Therefore upon this ground also, the defendant is entitled to succeed, the vice-chancellor being a judge of record. Again, it has been held that a prisoner is in lawful custody, although committed to a prison for the purpose of being again brought up for re-hearing, without any warrant, commitment, or written authority. One Gooding had assisted a prisoner, so committed, to escape, and, being indicted therefor, contended that the custody was not lawful on that account, and, if so, there was no offence: but the judges decided unanimously that the custody was lawful, notwithstanding there was no writing: *The King v. Gooding*, cited in *Davis v. Capper* (*h*). Now, the jurisdiction under the charter is left largely to the discretion of the vice-chancellor; and an imprisonment thereunder may be thought to be in closer analogy with a commitment to suppress immediate disorder, and for further inquiry, than with a commitment in execution of a sentence for a definite crime. The description of the offence is extremely undefined, and the power is, to im-

(*d*) See *Ex parte Fernandez*, 10 C. B., N. S. 3, and the authorities there referred to.

(*e*) 2 Roll. Abr. Trespass, C., 553.

(*f*) 14 M. & W. 57.

(*g*) 2 Hale, P. C. c. 57, p. 409.

(*h*) 10 B. & C. 34.

prison, not only those who are guilty, but also those who are suspected of evil. In trusting this wide discretion to the university, the legislature must have considered that it would be exercised only according to need, for suppressing immediate disorder: and it seems essential for its reasonable exercise that there should be power to make further inquiry by the officers of the university, and to remit the imprisonment whenever the result of such inquiry should make it right so to do, as was the case with the present plaintiff. It is not, however necessary to pursue this subject further. Suffice it to observe that the proposition advanced in argument, that the law requires a warrant in every case of commitment, is clearly erroneous. We therefore are of opinion that a committal in the exercise of this peculiar jurisdiction, where no special method is directed by the statute, although it was not shewn to be made under a warrant, gives no cause of action. The case of *Hutchinson v. Lowndes* (i) was relied on for the plaintiff to prove the contrary. There, the defendant was held liable in trespass because he committed the plaintiff to prison orally, without any warrant in writing, and kept him in prison beyond a time reasonably required for making out a warrant: but the ground of the judgment is expressed to be, because the statute which created the special authority under which the committal was made, also enacted that the authority so created should be exercised by making a warrant in writing. The decision, confined to that ground, is, by implication, an authority against an action of trespass for a commitment without a warrant, where the statute does not enact that the newly created authority shall be exercised by warrant, and where there is no implication that the legislature intended to make a warrant essential. We should further observe, in respect to *Hutchinson v. Lowndes*, that the plea was the general

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(i) 4 B. & Ad. 118.

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issue *by statute* ; but, if the justification had been pleaded *in extenso*, as here, the plaintiff could not have recovered for the excess of jurisdiction in imprisoning beyond the time so reasonably required, without a special replication, or a new assignment of excess. So, if the plaintiff here relied on any excess beyond the justification, she could not avail herself of it without so pleading.

With respect to the objection that the place of imprisonment was unlawful, because it was not proved to be a common gaol, that also appears to us to be unfounded. In support of it the plaintiff relied on the general rules stated in Bacon's Abridgment (*k*), that gaols can only be erected by Act of Parliament, and on the statute of Henry IV. (*l*), requiring a commitment to be made to a common gaol, and on the absence of any grant of a gaol to the university. But, considering the purpose for which the jurisdiction was created, and the nature of the fact for which the party was to be imprisoned, and referring to the observations before made on this point in relation to the absence of a warrant, and considering also that the place of confinement appeared to be the accustomed place used for that purpose by the university, we are bound to presume the usage to be lawful till the contrary is shewn,—which was not done here. There may be a lawful gaol in the keeping of a subject, by prescription or grant (*m*) : and see the statute 19 Hen. 7, c. 10, giving the custody of all the king's gaols, prisons, and prisoners to the sheriffs (*n*), and putting an end to many gaols held by individuals, except all gaols whereof any person or corporation have the keeping of estate of inheritance or by succession. It well consists with history (*o*), and the evidence in this cause, that the univer-

(*k*) Gaol and Gaoler (A).

(*l*) 5 Hen. 4, c. 10.

(*m*) See 2 Inst. 100.

(*n*) See stat. 21 & 22 Vict. c. 22.

(*o*) See 4 Inst. 255.

sity had, at the time of that statute, if not from its very foundation, among its privileges and franchises, a place for the confinement of some classes of prisoners committed by its own officers, and that the same privilege and franchise has continued by succession to the present time, and so made the place a lawful prison for the purpose to which it was applied. In *The Queen v. Archdall* (p) the right of the vice-chancellor to have the sole control over granting licences for the sale of beer in Cambridge, was disputed; and the judgment was for the university, for reasons which may be adopted in the present case. The Court there took notice that a control of the most absolute kind in certain respects was necessary for the preservation of discipline and morals, and the prevention of the disorder which the age and dispositions of the younger students would tend to produce; that the university, generally a favoured body, was not unlikely to procure from the Crown what might reasonably be asked for, and, being a learned body, would procure it in such a form as would render the grant valid. The Court further felt itself bound to presume in favour of the existing user, and refused to call on the vice-chancellor to justify the exercise of an ancient practice. If the place was lawful, it was not contended that the treatment therein would, upon these pleadings and this evidence, constitute a substantive cause of action against the defendant.

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For these reasons, we think that the defendant is entitled to make the rule absolute to enter the verdict for him, pursuant to the leave reserved at the close of the plaintiff's case. We consider that the replication, admitting the statute which confirmed the charter set out in the plea as fully as if it was repeated verbatim therein, admitted the charter as set out. But, if it was not thereby admitted, then, on giving the charter

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in evidence, the right of the defendant would be the same.

The other part of the rule,—for entering the verdict for the defendant upon the special finding of the jury,—is thus rendered immaterial: but the general importance of the case induces us to make some remarks upon the phases which it presents from this latter point of view. The contested allegations in the plea were disposed of separately at the trial. The construction of the charter, and the absence of a warrant, were within the province of the judge, and not for the jury. Of the other allegations, three only were required to be left to the jury separately, viz., first, whether the proctors had reasonable cause for suspicion of the plaintiff; secondly, whether the vice-chancellor heard and examined the plaintiff; thirdly, whether the place of imprisonment, and the treatment therein, were lawful. The jury found that the proctors had reasonable cause for suspicion, and that the complaint of the prison and the treatment therein was unfounded: but, in respect of the hearing and the examination of the plaintiff, they found that the defendant had not made due inquiry into her character, and (a matter clearly beyond their province) that the punishment was undeserved. This finding of the jury must be considered together with the course of proceeding at the trial.

The facts to be deposed to by the plaintiff were, for the most part, undisputed,—being confirmed by the evidence for the defendant. In respect of the facts themselves, there was no question: in respect of the effect of those facts, there was contest. Thus, the circumstances of the apprehension were not in dispute; but the contest was, whether, under those circumstances, the proctors had reasonable cause for suspicion. Thus, also, the statement of the plaintiff, that the vice-chancellor made inquiries of her, and heard her answers, was not in dispute; but the contest was, whether he had a right to

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put those inquiries to her, or to decide without hearing testimony on oath, or to decide without sending to refer to the persons mentioned by the plaintiff as knowing her character. The allegation was, that the defendant heard and examined the plaintiff. The plaintiff contended that the jury ought not to find that he had done so, if they were of opinion that the hearing and examination were not properly conducted in all or either of these respects. It appears by the finding, and by what passed at the time of the verdict, that the jury were of opinion that the hearing was not properly conducted in this respect,—that the defendant did not make due inquiry into the plaintiff's character. Now, although they meant their finding to support the plaintiff's case, they did not mean to do so at the expense of truth, nor to disaffirm the plaintiff's account of what passed between her and the defendant when she was brought before him. It was accepted as an imperfect verdict, rather than that the trial should be rendered abortive by reason of the jury not coming to an agreement: and we consider we give effect to the intention of the jury if we put this construction upon the whole of their finding,—that all the allegations in the plea are proved, with this exception, that, after the hearing, the defendant did not make such due inquiry into the plaintiff's character as he was in their opinion bound to do. In this sense, it certainly did not amount to a verdict for the plaintiff, because there is no issue upon the question whether the defendant was bound to make the inquiry which the jury required: and we are clear that he was not legally bound to do so. It therefore was, in point of law, a verdict for the defendant, because it affirmed the truth of every fact and every inference necessary to support the defence, and which it was for the jury to decide, and it denied only an immaterial fact, which ought not to affect the decision of the case.

• The result is, that the verdict entered for the plaintiff

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on this finding should be set aside, and the verdict entered thereon for the defendant, pursuant to the leave reserved.

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In examining the relation of the subject towards that branch of the executive by which justice is administered, and considering how far judicial officers are civilly liable for the mode in which they execute their duties, we must bear in mind the distinction between judges of the superior and those of the inferior courts; and the difference which, previously to the passing of the Common Law Procedure Act, 1852, existed between the action of trespass and that of case. That act rendered it unnecessary to specify a form of action in the writ of summons, and allowed the joinder of different forms of action (*q*). Nevertheless, in tracing the various actions which have been brought against judicial officers, we must not lose sight of the fact that trespass was the proper form of action for a direct injury and case for indirect or consequential damage; also that, where trespass lay, the mere fact complained of was the foundation of the action, whereas in case against a judicial officer, an allegation of malice or corruptness of motive was necessary to the maintenance of the action.

The distinction between judges of superior and those of inferior courts is important; for, although our law extends an ample protection to both, it recognizes the position and dignity of the former, whereas it requires to be informed by the pleadings as to the functions which the latter may discharge.

(*q*) 15 & 16 Vict. c. 76, ss. 3, 41. See also Rules of Supreme Court, 1883, Ord. XVIII.

As regards judges of the superior courts, at all events, a remark of Vaughan, C.J., in *Bushell's Case* (r), seems applicable. "When the king hath constituted any man a judge under him, his ability, parts, fitness for his place are not to be reflected on, censured, defamed, or vilified by any other person—being allowed and stamped with the king's approbation, to whom only it belongs to judge of the fitness of his ministers. . . . Nor must we, upon supposition only, either admit judges deficient in their office, for so they should never do anything right—nor on the other side must we admit them unerring in their places, for so they should never do anything wrong."

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Again, as we read in *Dutton v. Howell* (s), "excepting the case of the common known general courts of justice in Westminster Hall, which are immemorial; if anything be justified by the authority of other courts, the same must be precisely alleged, and how their commencement was, either by custom or letters patent."

It would be impertinent here to repeat the numerous authorities cited in the Principal Case relating to the immunity enjoyed by judges of the superior courts; but it may be fit to mention a very ancient case (t), in which it was laid down that "no man shall have an action on the case against a judge of record for giving a false judgment;" and the remark of De Grey, C.J., in *Miller v. Seare* (u) that:—"It is agreed that the judges in the king's superior courts of justice are not liable to answer personally for their errors in judgment."

(r) *Ante*, p. 120.

(s) Show. P. C. 23.

(t) 1 Roll. Abr. 92; Year Bk. 9
Hen. 6, 60.

(u) 2 W. Bl. 1141, 1144; and see
per Burrough, J., in *D. of Newcastle*
v. Clark, 8 Taunt. 632.

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"The courts of justice," said Lord Brougham, in *Ferguson v. The Earl of Kinnoul* (x) "that is the superior courts, courts of general jurisdiction, are not answerable, either as bodies or by their individual members, for acts done within the limits of their jurisdiction. Even inferior courts, provided the law has clothed them with judicial functions, are not answerable for errors in judgment." And Serjeant Hawkins (y) observes as follows:—"As the law has exempted jurors from the danger of incurring any punishment in respect of their verdict in criminal causes, it hath also freed the judges of all courts of record from all prosecutions whatsoever, except in the parliament, for anything done by them openly in such courts as judges. For the authority of a Government cannot be maintained, unless the greatest credit be given to those who are so highly entrusted with the administration of justice; and it would be impossible for them to keep up in the people that veneration of their persons, and submission to their judgments, without which it is impossible to execute the laws with vigour and success, if they should be continually exposed to the prosecutions of those whose partiality to their own causes would induce them to think themselves injured." Lord Tenterden also, in *Garnett v. Ferrand* (z), affirms that "no action will lie against a judge of record for any matter done by him in the exercise of his judicial functions."

It was suggested, by Mr. Nolan, in his argument in *Picton's Case* (a), that "the judges of his Majesty's courts of Westminster Hall are not responsible before each other,

(x) 9 Cl. & F. 289.

(y) 1 P. C. Bk. 1, c. 27, s. 6.

(z) 6 B. & C. 611, 625, and see

per Kent, C., *Yates v. Lansing*, 5 Johnson (U. S.) R. 291; 9 *Id.* 376.

(a) 30 St. Tr. 749.

because they are of equal rank, and in most cases they are co-ordinate in authority;" and in *Sutton v. Johnstone* (b), it was contended that "there is no court equal to the trial of the superior judges of the realm for facts done in judicature."

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These latter words are important, for we shall find hereafter that a judge of one of the superior courts may be tried for an offence which does not concern his judicature, and is committed independently of his judicial functions (c).

As to the mode of pleading by a judicial officer relying on his immunity, in *Houlden v. Smith* (d), Patteson, J., says that a defendant acting as judge of a court of record is protected from liability at Common Law, and therefore in such a case a plea of not guilty is sufficient. But it is well settled that no one is entitled to the protection extended by our law to one clothed with the character of judge, unless he actually be such: therefore, if acting under an invalid appointment or commission, he will not be exempted from civil liability on the ground of enjoying judicial immunity (e).

Having offered the above general remarks, let us proceed to consider a few cases regarding the civil liability attaching to particular judicial officers arranged as follows:—

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One instance occurs in the Reports of an action against the highest judge in the land, which was at suit of an attorney against Lord Brougham (f), to recover com-

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(b) 1 T. R. 493, 535; *ante*, p. 693.

(c) See *R. v. Johnson*, 29 St. Tr. 82; *post*, p. 795.

(d) 14 Q. B. 841, 852; *post*, p. 785.

(e) Broom's Comm. C. L., 6th ed.,

pp. 112 *et seq.*; *The Marshalsea Case*, 10 Rep. 70. See *Gahan v. Lafitte*, *post*, p. 777.

(f) *Dicas v. Lord Brougham*, 6 C. & P. 249; S. C., 1 M. & R. 309.

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pensation for imprisonment under orders made by him as Chancellor, sitting in bankruptcy, against the plaintiff, for contempt in not paying over certain moneys to the assignees of a bankrupt;—the only plea was not guilty. On the plaintiff refusing to be non-suited, Lord Lyndhurst, C.B., presiding at the trial, directed a verdict for the defendant, holding that as the Lord Chancellor was sitting in bankruptcy, and so exercising his general jurisdiction, no such action could be maintained against him, and that the plea of the general issue was sufficient. A bill of exceptions was tendered to this ruling, and agreed to be drawn up; but the case was not carried further.

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As regards the liability of a judge of a superior court, the case of *Taaffe v. Lord Downes* (*g*) claims attention. It was an action brought in the Common Pleas in Ireland for assault and false imprisonment. Pleas—1st. The general issue. 2ndly. Not guilty, as to part, and as to the residue a justification, for that the defendant was Chief Justice of the King's Bench (*h*), and, as such, issued a warrant under his hand, containing certain recitals, and commanding the persons therein named to apprehend and bring the plaintiff before him, or any of the justices of the King's Bench, to be dealt with according to law (*i*). That the plaintiff was arrested under the warrant by a person named in it, brought before the defendant, and by him delivered to bail for his personal appearance in the King's Bench, on the first sitting day of the then next Michaelmas Term, and for his attendance there, from day to day, and from term to term, to answer all such matters and things as should

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(*g*) 3 Moo. P. C. C. 36 n.; S. C.,
separately reported by Mr. Hatchell,
A. D. 1815.

(*h*) In Ireland.

(*i*) For alleged illegal conduct.

be then and there objected against him, on the part of the king. Issue was joined on the first plea, and the plaintiff demurred generally to the justification.

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After argument the majority of the Court, upon the above pleadings, gave judgment in favour of the defendant; Mayne, J., observing, "The action is for assault and false imprisonment. The plea in effect is, that all that is necessary or proper for the Court to inquire into in this action is, that the defendant is Chief Justice of the King's Bench; and as such, and in the course of his office of Chief Justice, issued a warrant—legal on the face of it—to cause this plaintiff to do what was necessary for his answering the charge (in the warrant fully recited) of a criminal offence, fully also recited to have been sworn to; and that the only assault and imprisonment was the constable's bringing the plaintiff to give bail, in the course of this proceeding. The plea of the Chief Justice does not say, that it is the right of a judge to imprison without cause; but that it is the right of a judge not to be called on, in every man's action—upon every exercise of his official authority—to become a defendant, before a court and jury—to show and make out the case by which it was his duty, as a judge, to imprison the party charged with crime or misdemeanor. But what is the fact to be put in issue? It is this; the plea of the Chief Justice says, 'You, the plaintiff, being imprisoned under my warrant, have a right to try by your action, in a court of law, whether I am a judge of the King's Bench; and whether I did more against you than issue a warrant according to the legal course, upon an alleged criminal charge. If I have done more, you can, on my plea, prove it. If I made a warrant

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the fraudulent cover for oppression, or corruption, or malice, you can, on my plea, aver that. If I have done anything against you, not in the course of my office, you can say so. If the charge recited in my warrant is no legal charge of an offence, your demurrer will serve you. But I deny your right to try before this Court and a jury in this action the grounds of my judicial acts or the rectitude or legality of my judgment.' The plaintiff, not content with this answer, demurs: and thereby contends, that the Chief Justice is by law bound here in this action to come to trial, not only of the matter of fact which he offers for trial, but of all the facts, grounds, detail of proceedings, and circumstances of offence, charged against the plaintiff; and also, that he must discuss, and bring to decision before this Court, or the judge at *nisi prius*, the rectitude and reasons of his acts and judgment. The plea brings the case to the same question as if the plaintiff had declared, that the Chief Justice, acting as a judge of the King's Bench, issued his warrant in the regular way, with recital of informations before him on oath, of a crime committed by the plaintiff; and that he held him to bail, to answer against that charge, in the proper court. The Chief Justice has done no more than bring on the record what the plaintiff omitted of these truths. If the plaintiff had so declared, the Chief Justice, I presume, would have demurred, and I would be of opinion that such demurrer ought to be allowed. It is now the same question, viz., Does the imprisonment now appear to this Court to have been a judicial act? If it does, the plea, standing admitted, is a bar.

"A second question, scarcely attempted to be made at the bar, will not require much argument, and little more

than an observation, viz., whether an action lies against a judge for his judgment or judicial acts ?

“ A third question, rather mentioned than argued, was on the distinction between judicial acts, in court, and out of court.

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“ And first, as to the question whether an action lies against a judge, for his judicial acts. The Chief Justice is by the common law a depositary of the king's authority, for the purpose of administering justice to the nation—he acts upon oath, and upon high confidence ; and immediately with his court represents the king in that sacred and important duty. The king does justice through his judges—they are his delegates ; and they are accountable to him alone (*k*), for the pure and honest performance of their trust ; and they and the king are, towards the people in dispensing the law, as it were, one individual authority. There must be some place and part in the stage of proceedings—some point in the administration of the law, where unqualified confidence is to be reposed and acknowledged ; and, in the declaring of justice to the nation, that place rests with the king's judges.

“ The difference between the judges of the superior and inferior courts has not been sufficiently attended to. The king's judges stand next to, or with the king, or for him, appointed by him, and responsible to him ; and he will have his justice done by them, and by them alone. The inferior judges stand under, and represent the authority of subjects ; they have only the responsible power of subjects entrusted to them ; or they are placed at a distance in responsibility from the king, and are subject to the control and direction of the superior courts. An

(*k*) *Ante*, p. 765.

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action before one judge for what is done by another, is in the nature of an appeal; and is the appeal from an equal to an equal" (l). "Judges are to be equally independent of the Crown, and of the people. If there must be parties in the nation, and one is inclined to degrade judges and intimidate them into subjection to their views, it may also happen, that another party may be so inclined the next day; the partisans of a king may wish to reduce them to servility—the partisans of anarchy or revolution, to render them their instruments of a worse despotism, or intimidate them from the performance of their duty, and from restraining the first and insidious efforts towards confusion and rebellion. The honest, good, and constitutional mind will always wish to find them entirely free and unbiassed; and will rather entrust them with a high and unquestionable authority, and, if guilty, leave their punishment to parliament alone, than hazard their fortitude and independence by the alarm, and question, pains and expense of as many actions as there may be acts of duty encountering the bad passions and prejudices of mankind." "There was one case in England, where an attempt somewhat similar to this was made; an action against the judges at the sessions in London (m); and there it was soon decided that no such action lay. Liability to every man's action, for every judicial act a judge is called upon to do, is the degradation of the judge; and cannot be the object of any true patriot or honest subject. It is to render the judges slaves in every court that holds plea, to every sheriff, juror, attorney and plaintiff. If you once

(l) This, as before observed, must be restricted to what is done in judicature, *ante*, p. 767.

(m) *Hamond v. Howell*, 1 Mod. 184; 2 Mod. 218.

break down the barrier of their dignity, and subject them to an action, you let in upon the judicial authority a wide, wasting, and harassing persecution, and establish its weakness in a degrading responsibility."

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The judgment of Lord Norbury, C. J., was to the same effect. "If," said his lordship, "it be once established, that the act in question emanated from, and was appropriate to, the legal duties of the office of Chief Justice, it must, on this argument, stand as an act purely judicial, and as such it must be exempted by the law from responsibility to the party by action."

Since the decision above abstracted, one case only calling for an application of the principles there enunciated has been reported. That was an action against a judge of the Court of Queen's Bench at Westminster (*n*), for improperly discharging, as it was alleged, a rule *nisi* obtained by the plaintiff in an action brought by her against one Vowles, whereby the plaintiff was put to expense. The defendant demurred on the grounds—1st. That no action lay against a judge of a superior court for anything done by him in his judicial capacity; 2ndly. That the declaration was bad for not alleging malice; and, 3rdly. That it was defective for not alleging want of reasonable and probable cause. On this demurrer judgment was pronounced in favour of the defendant. And an application by the plaintiff to amend, by introducing an allegation of malice and corruption, was refused; Crompton, J., observing, "It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly: therefore

*Fray v.
Blackburn.*

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the proposed allegation would not make the declaration good. The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the judges, and prevent their being harassed by vexatious actions. In the present case there can be no doubt that the action is most improper and vexatious."

The liability of a colonial judge next calls for consideration. *Calder v. Halket* (o) was an action of trespass, brought in the Supreme Court of Judicature at Fort William, to recover damages for the arrest and false imprisonment of the plaintiff by the defendant, in his character of judge and magistrate of a criminal court—upon the ground, amongst others, that as the plaintiff was an European, the defendant had no authority over him, the jurisdiction of his court being confined to natives.

After a verdict for the plaintiff in this case, the Supreme Court directed it to be entered for the defendant, and from this direction the appeal was brought.

*Calder v.
Halket.*

The Judicial Committee of the Privy Council in giving judgment for the defendant below, said that, looking at the facts in evidence in the case, enough did not appear to make him a trespasser. "We must," remarked the Court, "consider the defendant as being in the same situation as a criminal judge in this country, with the qualification, that he had no jurisdiction over one particular class, viz., the European-born subjects of the British Crown: and the question is, whether he is liable to an action of trespass for causing the plaintiff to be arrested, he being, in reality, exempt from his jurisdiction.

(o) 3 Moo. P. C. C. 23.

“If the particular character of the plaintiff be not taken into consideration, and if the case be treated as if he had been a native subject, there is no doubt that the defendant would have been protected; for it is not merely in respect of acts in court, acts *sedente curiâ*, that an English judge has an immunity, but in respect of all acts of a judicial nature, as was decided in *Taaffe v. Downes* (p), and an order under the seal of the defendant's court, to bring a native into that court, to be there dealt with on a criminal charge, is an act of a judicial nature, and whether there was any irregularity or error in it or not, would be dispunishable by ordinary process at law. But the protection would clearly not extend to a judicial act, done wholly without jurisdiction; and it is contended, that this order, with reference to a British-born person, is altogether without jurisdiction, because such person was not answerable to the general jurisdiction of the Court” (q).

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“The answer to the objection to the defendant's jurisdiction, founded on the European character of the plaintiff, is, that it does not appear distinctly in the evidence, upon which alone we are to act, whatever our suspicions may be, that the defendant knew, or had such information, as that he ought to have known of that fact; and it is well settled that a judge of a court of record in England, with limited jurisdiction, or a justice of the peace, acting judicially, with a special and limited authority, is not liable to an action of trespass for acting without jurisdiction, unless, he had the knowledge or means of knowledge, of which he ought to have availed him-

(p) *Ante*, p. 768.

(q) The stat. 53 Geo. 3, c. 155,

s. 105, was referred to, as not justifying the defendant.

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self, of that which constitutes the defect of jurisdiction" (r).

"It is clear that a judge is not liable in trespass for want of jurisdiction, unless he knew, or ought to have known, of the defect; and it lies on the plaintiff, in every such case, to prove that fact" (s).

"It does not appear from the evidence in the case, that the defendant was at any time informed of the European character of the plaintiff, or knew it before, or had such information as to make it incumbent on him to ascertain that fact. The point, therefore, which is contended for by the plaintiff, does not arise; and it is unnecessary to determine whether, if distinct notice had been given by the plaintiff to the defendant, or proof brought forward that the defendant was well acquainted with the fact of his being British-born, the defendant would have been protected in this case, as being in the nature of a judge of record, acting irregularly within his general jurisdiction, or liable to an action of trespass, as acting by virtue of a special and limited authority, given by the statute, which was not complied with, and therefore altogether without jurisdiction.

"The only doubt their lordships have had in the consideration of this case is, whether the evidence was

(r) Citing *Gwinne v. Poole*, Lutw. 1566; *The Marshalsea Case*, 10 Rep. 68.

(s) If a magistrate has no jurisdiction by reason of the existence of facts which he cannot be supposed to know, but which are peculiarly within the knowledge of the party grieved, no action can be maintained against him if he received no notice of the facts: *Pike v. Carter*, 3 Bing. 78. So it was said by Lord Kenyon, C. J.,

that if an action be brought in an inferior court, the cause of action not having arisen within its jurisdiction, the officers of the court could not be considered as trespassers in taking the defendant's goods: *R. v. Danser*, 6 T. R. 245. And in *Olliett v. Bessey*, Sir T. Jones, 214, the court said that it was impossible for an inferior court, or its officers, to know where the cause of action arose.

sufficient to [show that the defendant knew or ought to have known that the plaintiff was a British-born subject.”

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*Gahan v.
Lafitte.*

Gahan v. Lafitte (t) also came on appeal before the Privy Council. The appellants had been appointed judges of the Royal Court of St. Lucia under an invalid authority, and the respondent had in an action of trespass recovered damages against them for false imprisonment upon the ground that the appellants, never having been properly appointed judges, could not claim immunity as judicial officers. The Court held that the action had been well brought.

With regard to the liability of judges of Ecclesiastical Courts we find an expression of opinion in an early case (x), where a prohibition (y) was granted to a Court Ecclesiastical upon the suggestion that the vicar-general had cited the plaintiff *ex officio* to appear and answer to divers articles, and the Court said that the citation *ex officio* once in use had been virtually ousted by statute (z). If citations *ex officio* were allowed, whole counties, said the Court, might be cited without presentment; which would become a trick to get money. “And the party grieved can have no action against the vicar-

— of judge of
Ecclesias-
tical Court.

(t) 3 Moo. P. C. C. 382.

(x) *Birch v. Lake*, 1 Mod. 185.

(y) As to prohibition to the Ecclesiastical Courts, see Com. Dig. tit. Prohibition, G. 2; *Martin v. Mackonochie*, 3 Q. B. D. 730; 4 Q. B. D. 697, and 6 App. Ca. 424.

(z) By stat. 1 Eliz. c. 1, the Queen, by letters patent, might authorize any person exercising ecclesiastical jurisdiction, to administer an oath, *ex*

officio, whereby a supposed offender was compelled to confess, accuse, or clear himself of any criminal matter, and thereby made liable to censure or punishment; the branch of this statute relating to the said oath was repealed by 16 Car. 1, c. 11, s. 3, and 13 Car. 2, c. 12, s. 4: see Jacob, Law Dict. tit. *Ex Officio*. Thereupon the citation *ex officio* became virtually obsolete. See *Birch v. Lake*, 1 Mod. 185.

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general, being a judge, and having jurisdiction of the cause, though he mistake his power."

Excommunication, as a means of enforcing the decrees of the Ecclesiastical Courts, at common law laid the person excommunicated under many disabilities (a); hence an action has been held to lie against the judge of such a court for excommunicating a person in a cause of which he had not cognizance (b), or for refusing to assoile after satisfaction had been made (c).

Two modern cases occur of actions brought against ecclesiastical judges for unlawfully exercising the power of excommunication. 1st, *Beaurain v. Scott* (d), which was an action for unlawfully excommunicating the plaintiff under the following circumstances. The plaintiff was a practising attorney, the defendant was vicar-general of the Consistorial Court of the Bishop of London, and whilst a cause of divorce *à mensâ et thoro* was pending in that Court between a minor, son of the plaintiff, and his wife, to which cause the plaintiff was no party, the defendant summoned the plaintiff to appear and become guardian *ad litem* to his son; this the plaintiff refused to do, and, on such refusal, without any citation being served upon him, he was excommunicated by the defendant. On appeal, Sir John Nicholl, Dean of the Arches, held that the plaintiff was compellable to become guar-

(a) 3 Bla. Com. 21st ed. 101-2. But by stat. 53 Geo. 3, c. 127, it was provided, that no person "pronounced or declared excommunicate," shall incur thereby any civil penalty or incapacity whatever, save such imprisonment not exceeding six months, as the ecclesiastical court shall decree: 3 Steph. Comm. 320; and see further as to the coercive jurisdiction of eccle-

siastical courts, Report of Eccles. Courts Commissioners, 1883.

(b) 3 Bla. Com., 21st ed., 101; Inst. 623; Doct. & Stud. Dial. 2, c. 32.

(c) 2 Inst. 623. *Et vide* Bracton, lib. 5, fol. 408, 409.

(d) 3 Camp. N. P. C. 388; S. C. separately reported by Mr. Beaurain, ed. 1814.

Beaurain v. Scott.

dian *ad litem* to his son, and that the excommunication was regular; thereupon the matter was referred back to the Consistorial Court, by which the schedule of excommunication issued, and was duly published.

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Regard being had to the above facts, the plaintiff's counsel contended that the action was maintainable on two grounds. 1st, Because the Ecclesiastical Court had no authority to compel the plaintiff to become guardian to his son. 2ndly, Because no regular citation or monition had been served upon the plaintiff before the excommunication was directed. It was admitted that the plaintiff had previously made an affidavit in the suit respecting the appointment of a guardian; but it was insisted that till a regular citation or monition had been served upon him he was not properly before the Court, wherefore the judge could have no authority to proceed to excommunication.

On the other side, witnesses were called to prove that the plaintiff was bound to become guardian for his son (e), and that the proceedings were regular. It was moreover proved that the plaintiff had knowledge of the order to become guardian *ad litem* as soon as it had been pronounced.

Lord Ellenborough, C. J., left it to the jury to decide upon the effect of the evidence adduced, intimating that the practice of the Ecclesiastical Court was a question of fact to be decided by them, and stating that he himself did not perceive anything unreasonable in the plaintiff

(e) *Vide Boraïne's Case*, 16 Ves. 346, where, upon an application to the Court of Chancery for a writ, to be directed to the Bishop of London, requiring him to absolve the plaintiff from this excommunication, Lord

Eldon, C. (though he refused the writ on technical grounds) observed, "At present I cannot see the principle upon which, with regard to a son forisfamiliar, the father can be compelled to be guardian *ad litem*."

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being required to become guardian *ad litem* in the manner described; and that the plaintiff seemed to have had sufficient notice of the appointment according to the practice of the Ecclesiastical Court.

The jury, nevertheless, found a verdict for the plaintiff with 40s. damages, observing that they did not mean thereby to cast the slightest reflection upon the character of the defendant.

No motion was made for a new trial or in arrest of judgment.

*Ackerley v.
Parkinson.*

2ndly. *Ackerley v. Parkinson (f)* was an action on the case against the vicar-general of the Bishop of Chester, and his surrogate, for unlawfully excommunicating the plaintiff; it was tried before Lord Ellenborough, when a verdict was found for the plaintiff, subject to the opinion of the Court on a case reserved setting forth that proceedings were taken in the Consistorial Court of Chester in a suit promoted by O., pretending to have interest in the goods, chattels, and credits of one A., deceased; that the plaintiff was thereupon cited at the instance of O., then to take on him letters of administration to the said A., to exhibit an inventory of all the goods of the deceased which had come to his hands, and also to render a true account of his administration. The case reserved further set forth—That the plaintiff did not take upon himself administration, and, after various delays, was decreed contumacious, and was excommunicated. That he appealed first to the Prerogative Court of York, and afterwards to the Court of Delegates, which latter Court pronounced for the appeal, and dismissed the plaintiff from the original citation, and from all further observance

of justice in the said cause. Also, it was negatived that the defendants, or either of them, had acted maliciously.

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The question for the opinion of the Court was, whether the plaintiff was entitled to recover against both or either of the defendants; or whether a nonsuit should be entered.

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Two questions were made for the defendants; 1st, whether an action upon the case would lie against the Ecclesiastical judge under the circumstances stated, it being contended by the defendants that the judge had jurisdiction, although the proceedings were erroneous: 2ndly, whether the action would lie without malice.

On the part of the plaintiff it was argued that the judge had no jurisdiction, as the Ecclesiastical Court could not compel any one to take out letters of administration; that they could merely issue a citation in the alternative, calling upon him to take out administration, or to renounce, in which case administration might be granted to another.

On the other hand it was contended by the defendants that though an action would lie against an Ecclesiastical judge, if he proceeded to excommunicate where he had no jurisdiction; yet, if he had jurisdiction, no action would lie against him though he wrongfully proceeded to excommunicate. It was further argued that here the defendants had jurisdiction in the cause, and had a right to cite the plaintiff before them; and though the citation, which left the plaintiff no option as to taking out administration, was void, it was no more than an erroneous proceeding in a cause over which the Court had jurisdiction, and for which a judge could not be answerable.

The Court took the view latterly presented, holding

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that the judge had a general jurisdiction over the subject matter, and though the citation was void, that the fact of the Court having in the course of exercising its jurisdiction come to an erroneous decision, afforded no ground for an action.

In *Ackerley v. Parkinson*, the Court, having a general jurisdiction, made a false step in exercising it, whereas in *Beaurain v. Scott*, the plaintiff never was lawfully before the Court, the jury having found the practice to be that the defendant had no authority to call upon him to appear for the purpose of being appointed guardian *ad litem*.

—of Com-
missioners
of Bank-
ruptcy.

Miller v.
Seare.

As shewing the liability which attached to Commissioners of Bankruptcy under former Acts, several cases may be shortly noticed. In *Miller v. Seare* (*g*) such a commissioner was held liable to an action of false imprisonment for having improperly committed a bankrupt, on the ground that he had not satisfactorily answered the questions put to him; and in *Doswell v. Impey* (*h*) trespass was held not maintainable against Commissioners of Bankruptcy for committing a bankrupt upon the like ground. This case having been decided upon the words of the statute *infra* (*i*), that the bankrupt shall full answer make “to the satisfaction of the commissioners.” Even in this view, however, the Court said that such commissioners would be liable to criminal prosecution for any abuse of their authority. In the subsequent cases of *Isaac v. Impey* (*k*) and *Crowley v. Impey* (*l*), no objection was taken that an action against the commissioners would not lie (*m*).

(*g*) 2 W. Bla. 1141.

(*h*) 1 B. & C. 163.

(*i*) 5 Geo. 2, c. 30, s. 16.

(*k*) 10 B. & C. 442.

(*l*) 2 Stark. N. P. C. 261.

(*m*) 1 & 2 Will. 4, c. 56, s. 1,

The office of coroner, we read (*n*), is of such antiquity that its origin is unknown. The Coroner's Court is a court of record (*o*) of very high authority (*p*); the Lord Chief Justice of England being the supreme Coroner of the land (*q*).

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In regard to the civil liability of a coroner, *Garnett v. Ferrand* (*r*) may be consulted. That was an action of trespass for ejecting the plaintiff from a room in which an inquest was being held by the defendant. It did not appear that the plaintiff had any interest in the matter investigated, or any information to offer which might aid the inquiry, and the Court held that the action would not lie. Lord Tenterden, C. J., observing, "it is a general rule of very great antiquity, that no action will lie against a judge of record, for any matter done by him in the exercise of his judicial functions." And again—"It is

*Garnett v.
Ferrand.*

enacted that the Court of Bankruptcy "shall, together with every judge and commissioner thereof, have, use, and exercise all the rights, incidents, and privileges of a court of record, or a judge of a court of record, and all other rights, incidents, and privileges, as fully to all intents and purposes as the same are used, exercised, and enjoyed by any of his Majesty's Courts of Law or Judges at Westminster." In *Van Sandau v. Turner*, 6 Q. B. 773, the Court intimated that the protection thus given extended to the commissioners only whilst acting within their jurisdiction.

By 32 & 33 Vict. c. 71, s. 65, "the London Bankruptcy Court shall continue to be a Court of law and of Equity and a principal Court of record, and the Chief Judge in Bankruptcy shall have all the powers, jurisdiction, and privileges possessed by any Judge

of Her Majesty's Superior Courts of Common Law at Westminster, or by any Judge of Her Majesty's High Court of Chancery." And by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), the London Bankruptcy Court is united and consolidated with, and forms part of, the High Court of Justice.

(*n*) *Grange v. Denny*, 3 Buls. 174, 176, *per* Dodderidge, J.; *Jervis on Coroners*, p. 2.

(*o*) *Britton*, c. 1, fo. 3.

(*p*) *Per* Crompton, J., *Thomas v. Churton*, 2 B. & S. 475, 478.

(*q*) 4 Rep. 57 b.; *Bardee's Case*, 2 Sid. 101. The puisne judges of the Queen's Bench Division of the High Court are also "sovereign coroners of the land," 4 Inst. 73; *Year Book*, 17 Edw. 3, 13 a.

(*r*) 6 B. & C. 611.

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argued on the part of the plaintiff that the Court of the coroner is a public court, and ought to be open to the entrance of all his Majesty's subjects, or at least of so many as the place will contain. Now it is obvious that the inquiries made in this Court ought, for the purposes of justice in some cases, to be conducted in secrecy. They are preliminary inquiries which may or may not end in the accusation of particular individuals, it may be requisite that particular persons should not in so early a stage be informed of the suspicions which may be entertained against them, and of the evidence on which such suspicions are founded, lest they should elude justice by flight, by tampering with witnesses, or otherwise. Cases also occur in which privacy may be necessary for the sake of decency; others in which it may be due to the family of the deceased. Who, then, is to decide whether privacy be necessary or proper? We answer, the coroner, and the coroner alone, and that the propriety of his decision cannot be questioned in an action. Even where absolute privacy may not be required, the exclusion of particular persons may be necessary or proper. Who, then, is to decide upon this? We again answer, the coroner, and the coroner alone, and that the reason of his decision cannot be tried in an action. In many cases it would be impossible to conduct proceedings with due order and solemnity unless the presiding officer, whether he be judge, coroner, justice, or sheriff, has the control of the proceedings and the power of admission or exclusion, according to his own discretion. It is not to be expected that such officers will act at the peril of being harassed with a multiplicity of actions; there are few who would not prefer to allow disorder and confusion, rather than run such a risk. The power of

exclusion is necessary to the due administration of justice.”

In the above case accordingly, the attempt to fix the coroner with liability was unsuccessful.

Houlden v. Smith (s) exemplifies the doctrine that the judge of a court of record is civilly amenable for his act done where he has no jurisdiction, and is not misinformed as to the facts on which jurisdiction depends (t). That was an action of trespass for false imprisonment, in which a verdict was found for the plaintiff subject to the opinion of the Court upon a special case, the facts of which were as follows :—The plaintiff being a resident in Cambridgeshire was sued at the County Court of S—— in Lincolnshire by special order of the defendant, under s. 60 of the original County Courts Act (u). He was served with that order in Cambridgeshire, and, not appearing, judgment was given against him by default at the S—— Court. A warrant against his goods within the jurisdiction of that Court was issued and transmitted (x) to the County Court in Cambridgeshire, and returned “no effects.” Thus far all the proceedings had been regular. Afterwards, however, a judgment summons was issued by the defendant, calling on the plaintiff to appear at the S—— Court to be examined, and this summons was without jurisdiction, for the section (y) of the Act which authorizes such a summons, directs it to be issued by the county court of the district where the plaintiff shall then dwell (z) or carry on busi-

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(s) 14 Q. B. 841.

(t) See *Calder v. Halket*, ante, p. 776.

(u) 9 & 10 Vict. c. 95.

(x) Under s. 104.

(y) S. 98.

(z) See now 19 & 20 Vict. c. 108, s. 48, which enacts that a judgment summons “may by leave of the judge be obtained from the court in which judgment was obtained, although the judgment debtor shall not then dwell

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ness, which was the County Court of Cambridgeshire. On default made by the plaintiff in appearing to the judgment summons, the defendant, as judge, *bonâ fide* believing that he had power and authority to do so, committed the plaintiff for contempt, being nevertheless aware that the plaintiff was resident in Cambridgeshire. This case was therefore held (a) not to be within the principle of those cases (b) where the supposed facts, though subsequently found to be false, were such as if true would have given jurisdiction, and where the question as to jurisdiction or not depended on the state of facts as they appeared to the magistrate or judge assuming to have jurisdiction. In the case *sub judice* the facts before the defendant, and known to him, showed that he had not jurisdiction; his mistaking the law as applied to those facts could not give him even a *primâ facie* jurisdiction, or the semblance of any. The only questions therefore were, whether the defendant was protected from liability, either at common law, being and acting as judge of a court of record, or by the provisions of any statute. As to these questions the Court observed that though the judge of a court of record is not answerable at common law for an erroneous judgment, yet no precedent had been found for saying that he is not answerable for an act done by his command and authority where he has no jurisdiction (c). Is he then protected by any statute? There are statutes (d) which enable the

or carry on business within the district of such court, if the judge shall think fit in the exercise of his discretion to grant such leave;" and see County Court Rules, 1875, Order XIX., Rule 7.

(a) Judgm. 14 Q. B. 852.

(b) *Lowther v. Earl of Radnor*, 8 East, 113; *Gwinne v. Poole*, Lutw. 1560.

(c) Citing and distinguishing *Dicas v. Lord Brougham*, ante, p. 767.

(d) 21 Jac. 1, c. 12, s. 5; 42 Geo. 3, c. 85, s. 6.

defence, when it exists, to be given in evidence under the general issue, but they do not protect a party acting without jurisdiction (*e*).

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It would be impossible, within the limits assigned to this work, to notice the numerous cases concerning magisterial liability for acts done without, or in excess of, jurisdiction (*f*). It is enough to say that the powers and immunities of justices chiefly depend upon certain well-known statutes (*g*), of which the one which has most reference to our present enquiry is called "An Act to protect Justices of the Peace from vexatious actions for acts done by them in the execution of their office," and its main provisions are as under:—

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1st. An action against a justice for an act done within his jurisdiction shall be case, and such act shall be alleged to have been done maliciously and without reasonable and probable cause (*i*).

2ndly. For an act not done within his jurisdiction no such allegation shall be needed; but no action shall be brought for anything done under a conviction or order till after such conviction or order shall have been quashed; nor for any act done under a warrant to compel appearance for an alleged indictable offence, if a summons were previously served and not obeyed (*k*).

(*e*) See *Willis v. Maclachlan* (1 Ex. D. 376; 45 L. J. Ex. 689), where an action was held to lie against a revising barrister for expelling a person from his court under a mistaken view of the powers conferred on him by the stat. 28 Vict. c. 36, s. 16.

Peace; Addison on Torts, 5th ed., 600-626; and Paley on Summary Convictions, 6th ed., Part IV.

(*g*) See 11 & 12 Vict. cc. 42, 43, 44 (Jervis's Acts); 42 & 43 Vict. c. 49; 47 & 48 Vict. c. 43.

(*i*) 11 & 12 Vict. c. 44, s. 1. See Rules of Supreme Court, 1883, Ord. XIX., r. 22.

(*k*) 11 & 12 Vict. c. 44, s. 2.

(*f*) For general information upon this subject the reader is referred to Burn's Justice, tit. Justice of the

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3rdly. If one justice make a conviction or order, and another grant a warrant upon it, the action must be brought against the former, not against the latter (*l*).

4thly. No action shall be brought against a justice for issuing a distress warrant for a poor rate, on the ground that the rate is invalid, or the person not rateable (*m*).

5thly. If a justice has a discretionary power given to him by any Act of Parliament, no action shall lie against him for the manner in which he has exercised that discretion (*n*).

6thly. If a justice refuses to do an act for fear of an action, the person requiring it to be done may apply, under certain regulations, to the Queen's Bench Division of the High Court of Justice to order the justice to perform such act; and if he does it in pursuance of such order no action will lie against him (*o*).

7thly. In most instances the justice may pay money into court (*p*).

Other provisions are contained in the statute as to pleading, damages, costs, and notice of action, the general effect of this enactment being that a magistrate, acting *bond fide*, is protected, unless for an act done altogether without jurisdiction (*q*).

Other judicial officers.

Various other officers exercising judicial or quasi-judicial functions are protected by our law when acting within their jurisdiction, though erroneously (*r*); *secus*,

(*l*) 11 & 12 Vict. c. 44, s. 3.

(*m*) *Id.* s. 4.

(*n*) *Id. ib.*

(*o*) *Id.* s. 5; and see 35 & 36 Vict. c. 26, s. 2.

(*p*) Sect. 11.

(*q*) See *Gelan v. Hall*, 2 H. & N.

379; S. C., 27 L. J. M. C. 78. As to notice see *Taylor v. Nesfield*, 3 Ell. & B. 730.

(*r*) See Broom's Leg. Max. 6th ed. p. 88; *Andruss v. Marris*, 1 Q. B. 3; *Carratt v. Morley*, *Id.* 18, and cases there cited.

when acting without jurisdiction. Some cases upon this subject are subjoined.

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In an old case it was said that an action would lie against Commissioners of Excise for adjudging "low" wines to be "strong waters" within the under-mentioned statute (s), as thereby they went out of their jurisdiction; *aliter*, if they had made a mistake within their jurisdiction (t). So, Commissioners of Sewers, having made a rate which was invalid for want of the presentment of a jury (u), have been held liable in trespass for taking the plaintiff's cattle under a distress warrant issued by them for arrears of such rate (x).

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cial officers.

On the other hand, it has been decided that the sheriff presiding in the county court, as anciently constituted (y), and the steward of a court baron (z), are judicial officers, acting in a judicial, not ministerial, manner; therefore an action will not lie against either of these officials if their bailiffs seize by mistake the goods of A. under a warrant issued against the goods of B. But though the steward of a court baron is a judicial officer, and therefore irresponsible for the acts of the regular bailiffs of the court, he may incur responsibility should he direct process to bailiffs specially nominated by the party who sues it out (a).

Nor will an action lie against an arbitrator for want of skill or negligence in making his award, the parties between whom he decides having placed him in the posi-

(s) 12 Car. 2, c. 23.

52; *Brown v. Copley*, 7 M. & Gr. 558, and cases there cited.

(t) *Terry v. Huntington*, Hardr. 480.

(z) *Holroyd v. Breare*, 2 B. & A. 473.

(u) 3 & 4 Will. 4, c. 22, s. 17.

(x) *Wingate v. Waite*, 6 M. & W. 739.

(a) *Bradley v. Carr*, 3 M. & Gr. 221.

(y) *Tinsley v. Nassau*, Moo. & M.

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tion of a judge (*b*). This rule also extends to persons who are quasi-arbitrators, thus it has been held that a broker (*c*), an architect (*d*), or an average adjuster (*e*), when called upon to decide between parties as quasi-arbitrators, cannot be made liable to an action unless they have acted fraudulently, corruptly, or maliciously.

We have hitherto considered the liability of various officials for acts done, we now proceed to notice their liability for words spoken in the discharge of judicial functions.

It has been held in Scotland that a censure pronounced from the bench, by a judge of the Court of Session, on an advocate for his manner of pleading in a cause, did not afford competent ground for an action, though averred to be unfounded, malicious, and injurious (*f*). This decision was upheld in the House of Lords (*g*), where Lord Gifford affirmed that a private individual cannot maintain an action against a judge for words spoken in the exercise of his judicial duty, and delivered from the bench.

An action having been brought against a magistrate in Scotland for defamatory words, uttered on the bench in the discharge of his judicial functions (*h*), damages were recovered, the Court directing the jury that, to support the action, malice was necessary, but might be inferred

(*b*) *Per Helt*, C. J., *Morris v. Reynolds*, 2 Ld. Raym. 857; *Wills v. Muccarmick*, 2 Wils. 148; *Re Hopper*, L. R. 2 Q. B. 367; 36 L. J. Q. B. 97.

(*c*) *Pappa v. Rose*, L. R. 7 C. P. 32, 525; 41 L. J. C. P. 11, 187.

(*d*) *Stevenson v. Watson*, 4 C. P. D. 148.

(*e*) *Tharsis Sulphur Co. v. Loftus*,

L. R. 8 C. P. 1; 42 L. J. C. P. 6.

(*f*) *Hagart's Trustees v. Hope*, 20 Fac. Dec. 371. See also *Hamilton v. Anderson*, 3 Macq. Sc. App. 363.

(*g*) *Shaw*, App. Ca. 125, 143.

(*h*) *Robertson v. Allardice*, 6 Shaw & Dun. 242.

from the whole circumstances of the case. This ruling was upheld in the Court of Session (*i*). On appeal the House of Lords held that a justice of the peace might be liable to an action for slander under the above circumstances. They also held, however, that malice could not be inferred, but must be directly proved, and therefore a new trial was directed (*j*).

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In delivering judgment in this case, Lord Wynford alluded to *Anon. v. McNiel* (*k*), as showing that malice is not to be inferred from the violence, indecency, or profanity of language used.

The immunity of a County Court Judge from an action for words spoken in his judicial capacity, whilst sitting in his Court, was fully recognized in the case of *Scott v. Stansfield* (*l*). In that case the Court of Exchequer were unanimously of opinion that no such action could be maintained, though the words complained of were alleged to have been spoken by the defendant maliciously and without reasonable or probable cause, and to have been wholly irrelevant to the matters before him (*m*). "For the benefit of the public," says Channell, B., in that case, "and the due administration of justice, the law provides that a judge is to be so far free and unfettered

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Stansfield.

(*i*) *Robertson v. Allardice*, 7 Shaw & Dun. 601.

(*j*) *Allardice v. Robertson*, 4 Wil. & Shaw, App. Ca. 102; S. C. 1 Dow & Cl. 495.

(*k*) 5 Brown, Sup. 573.

(*l*) L. R. 3 Ex. 220; 37 L. J. Ex. 155.

(*m*) "Whatever is said, however false or injurious to the character or interests of a complainant, by judges upon the bench, whether in the superior courts of law or equity,

or in county courts, or sessions of the peace, . . . is absolutely privileged, and cannot be inquired into in an action at law for defamation." *Per* Kelly, C. B., *Dawkins v. Lord Rokeby*, L. R. 8 Q. B. at p. 268.

As to the liability of an advocate for words spoken in the conduct of a case, see *Munster v. Lamb*, 11 Q. B. D. 588; 52 L. J. Q. B. 726. And as to witnesses, see *Seaman v. Netherclift*, 2 C. P. D. 53; 46 L. J. C. P. 128.

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in the administration of his office as not to be liable to an action for what he does in the capacity of judge, and so placed under restraint in the discharge of his duty" (n). A coroner also has been held not to be liable to an action for words falsely and maliciously spoken by him in his address to the jury at an inquest, Cockburn, C. J., reserving his opinion whether he might not be liable if he used the words without reasonable and probable cause (o).

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Though our judges are now appointed *quamdiu se bene gesserint* (p), not *durante bene placito* as formerly, and are only removable by the Crown on the address of both Houses of Parliament; and though, further to insure their independence, they are not allowed to be harassed improperly by actions, they cannot misconduct themselves with impunity. In *Garnett v. Ferrand* (q), after stating reasons why judges are not civilly liable for mistakes, Lord Tenterden, C. J., went on to say, "Corruption is quite another matter; so, also, are neglect of duty and mis-

(n) L. R. 3 Ex. p. 225.

(o) *Thomas v. Churton*, 2 B. & S. 475; 31 L. J. Q. B. 139.

A justice of the peace was indicted for having, at a general sessions of the peace, said to the grand jury, "You have not done your duty; you have disobeyed my commands; you are a seditious, scandalous, corrupt, and perjured jury." Lord Mansfield, C. J., held that it would be contrary to precedent and "subversive of all ideas of a constitution," to hold the defendant indictable, the words having been uttered by defendant in the execution of his duty, although his lordship suggested that the justice might properly be struck out of the commission for using the words in

question. *R. v. Skinner*, Loft, 55. At the close of the business at the Guildhall Police Court, one of the Aldermen took occasion to make some very strong remarks condemnatory of a handbill published by the plaintiff. In an action against the proprietor of a newspaper for libel in reproducing those remarks together with other criticism, the Court were unanimously of opinion that the occasion of uttering these remarks did not make them privileged, as they had nothing to do with any judicial proceeding; *Paris v. Levy*, 9 C. B. N. S. 342; 30 L. J. C. P. 11.

(p) *Ante*, p. 522.

(q) 6 B. & C. 611, 626.

conduct in it. For these, I trust, there is and always will be some due course of punishment by public prosecution." We read that *temp.* Edward III., Thorpe, C. J., was degraded for accepting bribes (*r*). And in the reign of Henry IV. (*s*) it was enacted that judges convicted of bribery should forfeit treble the bribe, be punished at the king's will, and dismissed from his service for ever (*t*).

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Lord Bacon we know was impeached for bribery and corruption, as Lord Chancellor, and having pleaded guilty, was sentenced to be fined and imprisoned, and to be incapable of holding any office or of sitting in Parliament (*u*). Also in 1725, twenty-one articles of impeachment were exhibited against Lord Macclesfield (*x*), which in substance charged him with having, whilst Chancellor, sold master-ships in Chancery when vacant, and with having received sums of money for allowing masters to sell or transfer their offices, with having connived at the practice of their misapplying the money of the suitors, with having concealed the offence of an insolvent master who had absconded, and with having allowed and advised the masters to traffic for their own benefit with trust money, and to conceal their frauds. Lord Macclesfield was found guilty, and heavily mulcted.

The judges of our inferior courts are under the general supervision of the High Court of Justice (Queen's Bench Division), where they may be proceeded against criminally for corruption or gross misconduct.

They are removable for misbehaviour, either at common law or by statute (*y*).

(*r*) 3 Inst. 146; 1 Lord Campbell,
Chief Justices, 90, 91.

(*s*) 4 Bla. Com. 139.

(*t*) 3 Inst. 146.

(*u*) 2 St. Tr. 1087; Spedding's
Life of Bacon, vii. 209.

(*x*) 16 St. Tr. 76.

(*y*) As to the removal of colonial

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With regard to County Court Judges, it is enacted (z), that the Lord Chancellor, or Chancellor of the Duchy of Lancaster, if he shall think fit, "may remove for inability or misbehaviour any such judge." When the Chancellor of the Duchy of Lancaster had removed a judge under the power thus conferred—the judge having had an opportunity of being heard in his own defence—the Court of Queen's Bench refused to interfere with the Chancellor's decision upon an application for a *quo warranto* against the successor (a). And in another case (b), a rule for a criminal information was obtained against a County Court Judge for alleged misconduct in his office, but was afterwards discharged, as it appeared that the Lord Chancellor having been applied to on the same ground had declined to interfere. But the Court intimated that it was still open to the applicant to institute criminal proceedings for misdemeanour in the ordinary course (c).

The Lord Chancellor, by ancient law, also had jurisdiction over coroners, and by stat. 23 & 24 Vict. c. 116, s. 6, is empowered to remove any coroner for inability or misbehaviour in his office (d).

A Justice of the Peace is liable to a criminal information for misconduct (e), and may be discharged from the Commission of the Peace at the Queen's pleasure, either by writ under the Great Seal, or by a new com-

judges for misbehaviour, see 22 Geo. 2, c. 75, and *Willis v. Gipps*, 5 Moo. P. C. C. 489; *Montagu v. Lieut.-Governor of Van Diemen's Land*, 6 Moo. P. C. C. 489.

(z) 9 & 10 Vict. c. 95, s. 18.

(a) *Ex parte Ramshay*, 18 Q. B. 173; S. C., 21 L. J. Q. B. 238.

(b) *Reg. v. Marshall*, 4 E. & B. 475; S. C., 24 L. J. Q. B. 242.

(c) *Per Wightman, J.*, 4 E. & B. at p. 482.

(d) *Ex parte Ward*, 30 L. J. Ch. 775; *In re Hull*, 9 Q. B. D. 689.

(e) *Reg. v. Badger*, 4 Q. B. 468, 474.

mission being made out in which his name does not appear (*f*).

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son.*

It is obvious that whatever immunity attaches to judges can only attach to them for acts done judicially; in respect of all other acts they are amenable to the laws (*g*). This proposition may be illustrated by the *Case of Mr. Justice Johnson* (*h*), who was indicted in England for having published a libel on the Lord Lieutenant, Lord Chancellor, and one of the Judges of Ireland. Being arrested in Ireland under the provisions of a statute (*i*) enabling offenders in one part of the United Kingdom to be arrested in another, he was brought by *habeas corpus* before all the Irish Courts in succession, by them remanded to custody, and afterwards tried at Westminster and found guilty. Though long arguments occurred in the Irish Courts respecting the legality of the defendant's arrest, and though evidence was brought forward in England to prove his innocence, it was not contended before any of the said tribunals that he was entitled to immunity by reason of his judicial character.

Protection
of judicial
officers.

Protection is specially extended to judicial officers, by inflicting punishment on those who obstruct them in the performance of their duties (*k*). One who utters threatening and reproachful words to a superior judge sitting in court is guilty of a high misprision, which has ere now been visited with fine, imprisonment, and corporal punishment (*l*). It is also deemed an offence to attack and

(*f*) 3 Burn's Justice, tit. Justice of the Peace.

(*g*) *Ante*, pp. 767, 772.

(*h*) 29 St. Tr. 81.

(*i*) 44 Geo. 3, c. 92.

(*k*) 1 Bla. Com. 84, 125; 1 Hale,

P. C. 230; 3 Inst. 140; *R. v. Earl of Thanet*, 27 St. Tr. 821, 949.

(*l*) 1 Bla. Com. 126; Cro. Car. 503.

Waynham was convicted in the Star-Chamber for accusing Lord

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slander the administration of the laws of the land, and on various occasions persons have been indicted for such a misdemeanor (*m*). To libel the administration of justice in commenting upon a trial is also indictable (*n*). Further, we may remind the reader that every Court of Record has the power of committing for contempt (*o*); though in the case of the inferior Courts of Record such power does not extend beyond cases of contempt committed *in facie curiæ* (*p*).

Having fenced in her judicial officers with every reasonable protection in the discharge of their important duties—leaving them liable to severest punishment for corruption, England's proudest boast is the purity of her judges. Should they ever be inclined to swerve from a strict adherence to legal principles, whether under the influence

Chancellor Bacon of injustice in a book which he presented to King James I., 2 St. Tr. 1059; cited *ante*, p. 469. And one Harrison was indicted for accusing Mr. Justice Hutton of high treason in the Court of Common Pleas, avowing as his reason, that the judge in his argument in the Exchequer Chamber pronounced against the right of the king to levy ship-money. He was found guilty, sentenced to be fined 5000*l.*, to be imprisoned during the king's pleasure, and to make submission in every court in Westminster Hall, Cro. Car. 503. Hutton, J., afterwards brought an action against Harrison, and recovered 10,000*l.* damages, Hutton, R., 131.

(*m*) To say of a sentence pronounced by the commissioners delegates of the Queen in disaffirmance of a marriage, that such sentence was unjust, wicked, and void, and that the delegates had acted against their consciences, was

held a high contempt of the Queen as well as of the judges, "for the slander of a judge in point of his judgment, be it true or false, is not justifiable;" *Fuller's Case*, 12 Rep. 42, 44.

In 1787 Lord George Gordon was found guilty of publishing a libel, which, purporting to be a petition to him from the prisoners in Newgate, contained most offensive expressions respecting the conduct of the judges in administering the law; *R. v. Lord George Gordon*, 22 St. Tr. 175.

(*n*) *R. v. Hart*, 30 St. Tr. 1131.

(*o*) *Ex parte Fernandez*, 10 C. B. N. S. 3, and cases there cited; S. C., 30 L. J. C. P. 321; *McDermott v. The Judges of British Guiana*, L. R. 2 P. C. 341; 38 L. J. P. C. 1.

(*p*) *Reg. v. Lefroy*, L. R. 8 Q. B. 134; *per* Quain, J., *ib.* p. 140; S. C., 42 L. J. Q. B. 121.

of political bias or the love of popularity, admonition in the words of two of our most distinguished magistrates may be thus addressed to them :—

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“When judges,” said Lord Redesdale (*q*), “in a court of justice take upon themselves to act upon what they conceive political evils or political benefits . . . they should consider whether, in endeavouring to [act thus] they are not producing a greater political evil than that which they are attempting to avoid. But I do not understand what right a court of justice has to entertain an opinion of a positive law upon any ground of political expediency. I have always been at a loss to conceive upon what ground a court of justice was entitled so to act. The Legislature is to decide upon political expediency; and if it has made a law which is not politically expedient, the proper way of disposing of that law is by an act of the Legislature, and not by the decision of a court of justice.”

Many years before the above words were uttered, Lord Mansfield had delivered that celebrated declaration concerning judicial conduct (*r*), which will cling to his memory for ever :—“I honour the king; and respect the people: but many things acquired by the favour of either are, in my account, objects not worth ambition. I wish popularity: but it is that popularity which follows; not that which is run after. It is that popularity which, sooner or later, never fails to do justice to the pursuit of noble ends, by noble means. I will not do that which my conscience tells me is wrong, upon this occasion, to gain the huzzas of thousands, or the daily praise of all the

(*q*) *Case of the Queensberry Leases*,
1 Bligh, 497.

(*r*) *R. v. Wilkes*, 4 Burr. 2562.

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papers which come from the press. I will not avoid doing what I think is right, though it should draw on me the whole artillery of libels, all that falsehood and malice can invent, or the credulity of a deluded populace can swallow. I can say with a great magistrate, upon an occasion and under circumstances not unlike, *Ego hoc animo semper fui, ut invidiam virtute partam, gloriam non invidiam putarem*” (s).

(s) Cic. *In Catilinam*, Or. I.

PART III.

RELATION OF THE SUBJECT TO PARLIAMENT.

HAVING considered the relation of the Subject to the Sovereign and to the Executive, the next head of our enquiry concerns his relation to Parliament—a word here used—rather in its popular than in its strict and legal sense—as signifying the two Houses of Parliament, exclusive of the Sovereign presiding in his royal political capacity. The relation of the subject to Parliament is peculiar; for Parliament has ere now assumed to be in some sense above the law:—"It is so high and mighty in its nature that it may make laws, and that that is law it may make no law" (a).

It behoves us then to consider, so far as may be practicable in the space allotted, how and to what extent the ordinary rights of Englishmen, the right to personal liberty and the right to private property, may be affected or jeopardised by the existence of this great and powerful Assembly in the land.

(a) 13 Rep. 64. In *Dr. Bonham's Case*, 8 Rep. 118, a, Lord Coke remarks that the common law will adjudge an Act of Parliament to be void if it be "against common right and reason, or repugnant, or impossible to be performed;" see also *Cromwell's Case*, 4 Rep. 13, a, and *Day v. Savage*, Hob. 87, where it is said that an Act of Parliament to create a man judge in his own case would be void in itself. But in *Lec v. Bude, &c., Railway Co.*, L. R., 6 C. P. 582, Willes, J., remarks, with reference to the last-mentioned case, "that dictum, however, stands

as a warning rather than an authority to be followed. If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it; but so long as it exists as law, the Courts are bound to obey it."

"The British Parliament certainly has no general power to legislate for foreigners out of the dominions and beyond the jurisdiction of the British Crown." Judgm. *Lopez v. Burslem*, 4 Moo. P. C. C. 305; and *per Parke, B., Jefferys v. Boosey*, 4 H. L. Cas. 815, 926.

BARNARDISTON v. SOAME, 6 St. Tr. 1063 (b).

(26 Car. 2, A.D. 1674.)

LEX ET CONSUETUDO PARLIAMENTI (c).

An action on the case does not, at common law, lie against a sheriff for maliciously making a double return of members to serve in Parliament.

THIS was an action on the case brought by Sir Samuel Barnardiston against Sir William Soame, the declaration setting forth :—

Declaration.

That whereas the king, by a writ out of Chancery, directed to the then sheriff of Suffolk, commanded that he should cause an election to be made of another knight for the said shire in the place of Sir Henry North, lately dead; and that he should certify the election under his own seal, and the seals of those who were present at the election, into the Chancery. Which writ was delivered to the defendant, then sheriff, and in full county, by the people resident in that county, was read. And although the plaintiff was duly elected to be knight for that county, by the greater number of the people then resident in the said county, every one whereof could spend 40s. *per annum* within that county: and although the defendant, then sheriff of the said county, *premissa satis sciens*, afterwards returned the said writ into the Chancery; together with an indenture (d), between him the said

(b) S. C., 2 Lev. 114; 3 Keb. 365, 369, 389, 419, 428, 439, 442, 586, 664; Pollexf. 470; 1 Freem. 380, 387, 390.

An interesting account of the proceedings in the above case is given by Mr. Dallas, *arg.* in *R. v. Picton*, 30 St. Tr. 784; *et vide per* Sir Thomas Powys, 14 St. Tr. 718; *per* Mr. Dormer, *Id.* 745.

(c) "*Lex et consuetudo Parliamenti, ab omnibus querenda, à multis ignorata, à paucis cognita.*" Coke, 1 Inst.

(d) At the opening of the debate in the House of Commons on the proceedings in *Ashby v. White*, 14 St. Tr. 703, Mr. Harley, the Speaker, observed that the great alteration in elections was in the beginning of

sheriff and the aforesaid electors, of the aforesaid election of the plaintiff, made according as the said writ requires.—Yet the defendant, then sheriff, *officii sui debitum minime ponderans, sed machinans et malitiose intendens ipsum Samuelem in hac parte minus rite prægravare*, and to deprive the plaintiff of the trust and office of one of the knights of the shire, to be exercised in parliament; and to cause the plaintiff to expend great sums of money; against the duty of his office, falsely, maliciously, and deceitfully returned into the Chancery, together with the aforesaid indenture, another indenture annexed to the said writ, purporting to be made between him the said defendant, then sheriff, of the one part, and divers other persons; containing, That the said other persons, as the greater part of the said county, did choose one Sir Lionel Talmach, Bart., otherwise Lionel Lord Huntingtower, as knight of the shire, to come to parliament. Whereas in truth, the said Lionel was not chosen by the greater part. By reason of which false return of the said other indenture, the plaintiff could not be admitted into the lower house at the return of the said writ, and a long time after: till the plaintiff upon his

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Declaration.

Henry IV.'s time, since whose reign the returns for parliament have been made by indenture. That by the stat. 7 Hen. IV., c. 15, there is a method prescribed of election and return, "and the occasion he took to be this: Henry IV. came to the succession of the Crown by the deposition of Richard II., when the parliament was sitting. That parliament was continued to Henry IV.'s time: for though in the rolls it was called a new parliament, and returns were made as by the sheriffs of the counties, and also by the boroughs, as if it were a new parliament; yet it was the same parliament, for they were

the same men, and there were too few days between one parliament and the other to have a new election." But Henry IV. having taken such an extraordinary step, would not leave it as a precedent to be found out; and afterwards, when times were more settled, in his 7th year it was provided, at the complaint of the Commons, that the return of a member should be by indenture, in order that the "same or like deceit should never be put upon the kingdom afterwards." As to the mode of certifying a return now in use, see 35. & 36 Vict. c. 33, Sched. I., s. 44.

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Declaration. petition to the Commons, and after he had spent divers great sums of money about the proving of his election, and divers pains and labours in that behalf sustained, afterwards *sc.* 20 Feb. *anno* 26 Car. II., was admitted, and his election was declared to be good. To his damage of 3000*l.*

Plea. The defendant pleaded Not Guilty, and upon trial at bar, Twisden, J., Rainsford, J., and Wylde, J., held, and so directed the jury, that if this double return was made

Verdict. maliciously, they ought to find for the plaintiff, which accordingly they did, and gave him 800*l.* damages. The evidence, however, as to the malice and falsity, was very slender; for a poll was granted; upon which the matter seeming doubtful, whether some of those who voted for the plaintiff had sufficient freehold to qualify them to vote, the sheriff, by advice of counsel then present, and of some members of parliament there also, made this double return, to prevent an action for a false return, in case it should appear that some freeholders who voted for the plaintiff had sufficient freehold. And afterwards, upon examination in parliament, the election of the plaintiff was adjudged good, and the defendant was committed for making the double return.

Judgment. The above judgment having, on motion to arrest it, been affirmed by the Court of King's Bench, a Writ of Error was brought upon it in the Exchequer Chamber, where the judgment was reversed (*e*) for the following reasons:—

Writ of Error. Judgment in Error. Lord Chief Justice North (*f*), after stating the declaration and proceedings in the cause, thus continued:—

I am of opinion that the judgment ought to be reversed; for that no such action as this, at bar, does lie by the common law.

Because this is a cause of considerable value, great

(*e*) Sir W. Ellis and Sir R. Atkyns, argued for the defendant on the motion in arrest of judgment.

(*f*) Who, as Attorney-General, had

damages being recovered; because it is a judgment of great authority, being upon a cause tried at the King's Bench bar, and given upon deliberation there; because it is a case of an extraordinary nature, and of great import, each party pretending benefit to the parliament by it; because it is an action *primæ impressionis*, that never was before adjudged, the report of which will be listened to after: I have taken pains to collect and set down the reasons that I must go upon in determining this case; that as the judgment had the countenance of some deliberation in the court where it was given; so the reversal, being with greater deliberation, may appear grounded upon reasons that ought to prevail.

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—
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I love rather to affirm judgments, than to reverse them; but I can attribute nothing of authority to the judgment, though it were given in a superior court, and upon deliberation; I must judge of it as if the case came to be judged originally by me: the argument to support a judgment from the authority of itself, is *Exceptio ejusdem rei cujus petitur dissolutio*, which must not be admitted in cases of writs of error. We are entrusted to examine and correct the errors of that court, and for that purpose we are made superior to it; we must proceed according to our own knowledge and discretion, or else we do not perform the trust reposed in us.

This is a cause *primæ impressionis*; and the question is, whether by this judgment a change of the common law be introduced? It is the principal use of writs of error, and appeals, to hinder the change of the law; therefore do writs of error in our law, and appeals in the civil law, carry judgments and decrees to be examined by superior courts until they come to the highest, who are entrusted that they will not change the law.

Therefore do writs of error lie from Ireland, which is a subordinate kingdom, to England, by whose laws it is governed; that they might not be able to change the

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law by their judgments, and not so much for the particular right of the party.

For otherwise it would be very easy for judges, by construction and interpretation, to change even a written law; and it would be most easy for the judges of the common laws of England, which are not written, but depend upon usage, to make a change in them, especially if they may justify themselves by such a rule as my brother Atkyns lays down to support this case, viz., that the common law complies with the genius of the nation (*g*). I admit that the laws are fitted to the genius of the nation; but when that genius changes, the parliament is only entrusted to judge of it, and by changing the law to make it suitable to it. But if the judges shall say it is common law, because it suits with the genius of the nation, they may take upon them to change the whole as well as any part of it, the consequence whereof may easily be seen; I wish we had not found it by sad experience.

If the case at bar be a change of the law, it is happy that it comes to be questioned in the first instance; for if this cause had been any way agreed and quitted, and a second case of this nature had been questioned, there would have been a precedent urged, which cannot be spoke of here; for this case hath no fellow, there never having been the like judgment before.

The method I shall take in what I have to say, shall be,
I. To remove some prejudice the case is under.

II. Give my reasons against the action.

III. Weigh what has been said to maintain the action.

I. The case is under this prejudice, that an action on the case lies for false returns of sheriffs, and why should

(*g*) Sir R. Atkyns had observed, "the common law does comply with and conform to the general opinion and genius of the kingdom, and values

what they generally esteem and value, and disesteems what they value not." 6 St. Tr. 1089.

it not lie in this case as well as any other? To remove this prejudice, I shall show some material differences betwixt the nature of ordinary returns and this return. In ordinary returns the party is concluded, and absolutely without remedy; for the court must take the return as the sheriff makes it. In ordinary cases the sheriff may, and frequently does, take security of the plaintiff, or the sheriff hath means by law to be secure; as, if he doubts the property of the goods, he may return a *fieri facias*, *nullus venit ad monstrandum bona* (*h*). In some cases he may, for his safety, impanel a jury, as upon an *elegit* (*i*); or he may resort to the Court, and pray reasonable time to prepare his return, if the matter be difficult (*h*); and hath other shelters, that, if he be wary, will save him from danger.

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But in this case the party is not concluded, for upon a petition to the parliament, if they see it just, they will cause the return to be altered by the clerk of the crown, if the sheriff be not in the way; in this case the sheriff may not take security, it were criminal in him to make such a return by compact, nor can the sheriff make a fruitless return or obtain delay to consult his safety.

II. My reasons against this action are as follows:—

1. My first reason is this, because the sheriff as to the declaring the majority is judge; and no action will lie against a judge, for what he does judicially, though it should be laid *falsò malitiosè et scienter* (*l*). They who are entrusted to judge, ought to be free from vexation, that they may determine without fear; the law requires courage in a judge, and therefore provides security for the support of that courage. But,

(1) Is the sheriff a judge in this case? And, (2)

(*h*) Dalton on Sheriffs, pp. 277, 556.

(*i*) Atkinson, Sheriff Law, 5th ed. p. 244.

(*k*) The sheriff "is bound to exe-

cute every writ in a reasonable time." Atkinson, Sheriff Law, 5th ed., p.

213, and cases there cited.

(*l*) *Ante*, p. 773.

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Is there the same reason he should be freed from all actions?

(1) It is of necessity that as to declaring the majority he should be judge upon the place; in other cases, in the county court, the freeholders are the judges, and he is the minister. When we say the freeholders, we mean the major part of them is to judge; but when the question is, Which is the major part? They cannot determine the question; but of necessity the sheriff must determine that, the nature of the thing speaks it.

Therefore it was held rightly in *Letchmere's Case*, anno 13 & 14 Car. II., that as to the election of knights to the parliament, the Court is properly the sheriff's court, and the writ is in the nature of a special commission, *Elegi facias*.

I know a judge may have many ministerial acts incumbent upon him, as the chief justices have to certify records upon writs of error; therefore it is necessary for me to observe, that the suit here is for what he does as a judge, and not for anything ministerial; which appears by the averment, that the sheriff annexed another indenture, specifying it to be made by the major part of the freeholders, and containing that the Lord Huntingtower was chosen, *ubi re verâ* the Lord Huntingtower was not chosen by the major part of the freeholders. If it had been said *ubi re verâ* the freeholders supposed to seal the same, never did seal the same, there had been a falsity in his ministerial part of sending in the indenture; but his sending his two indentures, which were really sealed by the freeholders, as they import, wherein the freeholders of each indenture (and not the sheriff) say, that they are the major part, is no falsity in his ministerial part, but only deferring to judge between them, which is the major part: or, more properly, judging that they are both equal in number.

They object, that the matter of this question is not matter of judgment, it is but counting the poll, which

requires arithmetic, but not judgment; but certainly, if it be rightly considered, it will be thought this question of majority is not barely a question of fact, but a question of judgment, a question of difficult judgment, there are so many qualifications of electors.

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1st. They must have 40*s. per annum*; there the value must be judged.

2ndly. It must be freehold; there the title.

3rdly. It must be their own; there colourable and fraudulent gifts made many times on purpose to get voices, must be judged.

4thly. The electors must be resident; here the settlement of the party must be determined.

5thly. There are many things that incapacitate voices, as bribery, force, &c., and many other questions arise, that are of such difficulty, in debate of them, much time is spent in parliament; and sometimes a committee determines one way, and the House another. Is not this then a question that refers to judgment?

They object again, the sheriff may give an oath concerning all the qualifications, and he is to look no farther.

I answer, the statute (*m*) has given the sheriff power to give an oath in assistance of him; but the statute does not say that whosoever takes that oath shall have a voice: neither does the statute of 23 Henry VI. (*n*) say, that the sheriff shall not be charged with a false return, that pursues that way: so that although he may use those means for his direction, yet he must consider his own safety, and not make a false return. If a man, upon taking such an oath, give the sheriff a special answer, or if it should be known to the sheriff he swears false, the sheriff must determine according to his own judgment, and not by what is sworn.

It may hence be concluded, that the sheriff, as to

(*m*) 8 Hen. 6, c. 7.

(*n*) C. 15.

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declaring a majority, is a judge (o); and if so, my next assertion is, (2) that there is the same reason he should be free from actions, as any judge in Westminster Hall, or any other judge. Does it not import the public, that the sheriff should deal uprightly and impartially? Ought he not to have courage, and for that end should not the law provide him security?

Consider his disadvantages; what a noise and crowd accompany such elections; what importunity, nay, what violence there is upon him from the contesting parties.

We may say, no other judge has more need of courage and resolution to manage himself, and determine uprightly, than he. No other judge determines in a case of greater consequence to the public, or difficulty, than he; expose him to such actions, and in most elections he must have trouble; for commonly each party is confident of his strength, his conduct, and his friends; so that let the sheriff return never so uprightly, the party that is rejected will revenge it by a suit, especially if he may sue at common law, to have boundless damages, without running any hazard himself, but of the loss of his costs.

If we judges, that find ourselves secure from actions, should not be tender of others that are in the same circumstances; it may well be said, "Wo unto you, for you impose heavy burthens upon others, but will not bear the least of them yourselves" (p).

2. My second reason is, because it is *alieni fori*, either to examine the right of the election, or behaviour of the sheriff; both which are incident, and indeed the only consideration that can guide in the trial of such causes, if they be allowed.

It is admitted, that the parliament is the only proper

(o) See the remarks of Lord Tenterden, C.J., in *Cullen v. Morris*, 2 Stark. 587; and see Smith's L. C.

p. 322, 8th ed.

(p) St. Luke, ch. xi., v. 46.

judicature to determine the right of election, and to censure the behaviour of the sheriff. How then can the common law try a cause, that cannot determine of those things, without which the cause cannot be tried ?

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No action upon the case will lie for a breach of a trust, because the determination of the principal thing, the trust, does not belong to the common law, but to the Court of Chancery : certainly the reason of the case at bar is stronger, as the parliament ought to have more reverence than the Court of Chancery.

They object, that it may be tried after the parliament hath decided the election ; for then that which the common law would not try is determined, and the parliament cannot give the party the costs he is put unto (q).

Then I perceive they would have the determination of the parliament binding to the sheriff in the action, which it cannot be ; for that is between other parties to which the sheriff is not called : it is against the course of law, that any judgment, decree or proceeding betwixt other parties should bind the interest of, or any way conclude a third person ; no more ought it to do here : it may be easy for parties combining to represent a case so to the parliament, that the right of election may appear either way as the parties please. Is it fit the sheriff, who is not admitted to controvert such determination, should be concluded by it, in an action brought against him, to make him pay the reckoning ?

Did the parliament believe, when they determined this election, that they passed sentence against the sheriff, upon which he must pay 800*l*. ? Sure if they had imagined so, they would, nay, in justice, they ought to have heard his defence, before they determined it.

And yet that was the measure of this case, the sheriff was not heard in parliament, indeed he was not blamed there : and yet upon the trial, which concerned him so

(q) *i.e.*, cannot award damages.

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deeply, he was not allowed to defend himself, by showing any majority or equality of voices, the parliament having determined the election.

I do not by these reflections tax the law of injustice, or the course of parliament of inconvenience; I am an admirer of the methods of both: it is from the excellency of them, I conclude this proceeding in this new-fangled action, being absurd, unjust and unreasonable, cannot be legal.

To answer the other branch of this objection, I say, it does not follow, that because the parliament cannot give costs, therefore this new-devised action must lie, to help the party to them.

For then such an action might as well lie in all cases where there is a wrong to be remedied by course of law, and no costs are given for it.

At the common law no costs were given in any case, and many cases remain at this day, where the statutes have given no costs: as in a prohibition, *scire facias*, and *quare impedit*, and divers other cases; and yet no action will lie to recover those costs, and why should it lie in the case at bar?

In this case the parliament have already had it under their consideration in the stat. 23 Hen. 6, c. 15 (r), and have appointed what shall be paid by the sheriff that offends, viz., 100*l.* to the party, 100*l.* to the king, and imprisonment; the parliament have stated what shall be paid for compensation, and what for punishment, and would have provided for costs if they had thought fit.

3. My third reason is, because a double return is a lawful means for the sheriff to perform his duty in doubtful cases. If this be so, then all aggravations of *falsò*, *malitosè et scienter*, will not make the thing actionable; for whatever a man may do for his safety, cannot be the ground of an action.

There is sometimes *damnum absque injuriâ*, though the thing be done on purpose to bring a loss upon another without any design of benefit to himself; as if a new house be erected contiguous to my ground, I may build any thing on purpose to blind the light of that new house, and no action will accrue, though the malice were never so great: much less will it lie, when a man acts for his own safety.

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If a jury will find a special verdict; if a judge will advise and take time to consider; if a bishop will delay a patron, and impanel a jury to enquire of the right of patronage; you cannot bring an action for these delays, though you suppose it to be done maliciously, and on purpose to put you to charges; though you suppose it to be done *scienter*, knowing the law to be clear: for they take but the liberty the law has provided for their safety, and there can be no demonstration that they have not real doubts, for these are within their own breasts: it would be very mischievous, that a man might not have leave to doubt without so great peril.

The course of parliament makes out the ground of this reason to be true in fact, so that a double return is lawful when the sheriff doubts; for if the parliament did not allow a double return in doubtful cases, they ought never to accept a doubtful return: If it were in itself a void and unlawful return, they ought not to endure it a moment, but send for the sheriff, and compel him forthwith to make a single return. But we see, where there is doubt, the parliament sends not for the sheriff before they have examined the case, and given particular directions.

And it must of necessity be the course: for suppose the voices are equal (s): suppose the election is void for force: suppose the sheriff doubts upon the validity

(s) By the Ballot Act, 1872 (35 & 36 Vict. c. 33, s. 2), the returning officer, if a registered elector, may

upon an equality of votes, but in no other case, vote for and return a candidate.

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of some voices,—shall he transmit his doubts especially to parliament? Was there ever any such thing done? Was there ever any other way but to make a double return, and leave it fairly to the decision of parliament?

It was said by my brother Ellis, that if the sheriff had returned, in the nature of a special verdict, the special matter, and had concluded in this manner, viz., if the parliament shall adjudge Sir Samuel Barnardiston to be chosen, then he returns him; and if the parliament shall adjudge the Lord Huntingtower to be chosen, then he returns him; such a return as this had been safe, and could have borne an action.

This is a pretty invention, found out for argument sake; but methinks it furnishes no force at all to the part for which it is brought, but rather shows the right to be the other way: for let any man of reason say, whether a double return as it is now used, be not the same thing in consequence? Is not a double return, as if the sheriff should say to the parliament, “The right of election is between these two, I am in doubt which of them I shall reject, and expect your directions.” This is the import of a double return, and is the same in effect, as if it had concluded like a special verdict; and so my brother Ellis’s instance should not be actionable, though he concluded otherwise.

That other new-fangled way could not be received.—
For,

- (1) The freeholders would never join in such a return.
- (2) Such a return is not capable of being amended by the sheriff.

But the judgment of the parliament must be entered upon record, to make it any return; it concluding nothing of itself, as a special verdict concludes nothing, till the judgment of the court be entered upon the roll with it.

- (3) The parliament will not, as I believe, admit of new devices in the course of their proceedings, whatever we do at law.

But the double return is practicable in the county, for the freeholders of each part will tender their indentures ; and it is easily amended in parliament, by rejecting the indenture of those freeholders that were not the major part, which way has been practised in doubtful cases for many years. So that I apprehend the case at bar to be more regular and favourable, than that case, which my brother Ellis put as a case that would bear an action.

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Again, suppose the sheriff had informed the parliament of his doubts, and that he could not readily determine where the majority was, but it was betwixt two persons, A. and B., and thereupon desired their favour, either to grant him time to determine it, if they please to command him so to do, or else, that they would decide it themselves, and he would obey what directions they should make in it ; and thereupon the parliament had taken upon themselves to determine it. This most clearly had not been actionable, for it is not actionable to delay a return to any court of justice, where the sheriff had leave from the court so to do. A double return, in my understanding, speaks the same thing to the parliament ; and upon it they may either direct the sheriff to make a single return, which is to cause him to decide it, or they may do it themselves.

And here, I must needs reflect upon the second reason I gave (t) against this action, that the matter of it is *alieni fori* ; I find myself and my brothers that argued for the action, engaged in a discourse of the nature of a double return, and the course of parliament upon it, which, as a judge, I cannot so well speak to. I had the honour to be of this House of Commons, and whilst I was there, I considered as well as I could the course of the proceedings of the House, and am therefore able to speak something of them, and I am brought into this

(t) *Ante*, p. 808.

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discourse necessarily by this action; but I must needs say, it is an improper discourse for judges, for they know not what is the course of parliament, nor the privilege of parliament. When the lords in parliament, whom they are bound to assist with their advice, ask the judges anything, concerning the course or privilege of parliament, they have answered, that they knew them not, nor can advise concerning them.

If in parliament we do not know, nor can advise concerning these things: how can we judge upon them out of parliament? We ought to know before we judge, and therefore we cannot judge of things we cannot know.

Our being engaged in a discourse improper for judges shews the action to be improper, as much as any other argument that can be made; and this argument arises from my brothers that argued for the action.

But now I am in this discourse, I must go a little farther; my observation from the course of parliament has been, that they will not permit the sheriff to delay his return, to deliberate, and he cannot take security of either party; and if a single return be not justified by the committee of elections, he is in danger of the statute of 23 Hen. VI.

It follows, that there is no way for an innocent sheriff to be safe, where he conceives doubt, but in making a double return; and if that should be actionable too, the service of the parliament would be the most ungrateful service in the world.

It seems ridiculous to me, that it should be objected, that this course of law is necessary to prevent the great mischief arising from double returns; whereas, if it be a mischief, or disliked by the parliament, either in general or any particular case, they may reject them when they please, and command the sheriff to make a single return; so that they may remedy it by their practice, without their legislative power.

Their practice hitherto has been to receive double
 returns, which therefore in some cases must be lawful,
 and in this very case the double return was accepted, and
 the sheriff no way punished for it: which he ought to
 have been, if he had been blameable.

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If double returns are accepted by parliament, they are
 allowed, and we must say they are lawful, which is the
 ground of my third reason: for which I hold this action
 not maintainable.

4. My fourth reason is, That there is no legal damage
 occasioned by the sheriff. The damages laid in the
 declaration are,

(1) Being kept from sitting in the House.

(2) The pains and charges he was put unto, to get his
 admittance into the House.

(1) That of his being kept from sitting in the House,
 is as much every man's damage in the whole county, nay,
 in the whole kingdom; and any man else might as well
 have an action for it, as the member chosen.

To sit in parliament is a service in the member, for the
 benefit of the king and kingdom; and not for the par-
 ticular profit of the member.

It is a rule in law, that no particular man may bring an
 action for a nuisance to the king's highway; because all
 the men in England might as well have actions, which
 would be infinite; and therefore such an offence is
 punishable only by indictment, except there be special
 loss occasioned by that nuisance.

For the same reason, the exclusion of a member from
 the House, being as much damage to all men in England,
 as to himself, he, nor any man else in England, can have
 an action for it; but it is punishable upon the public
 score, and not otherwise.

For this reason was the statute of 23 Hen. VI. wisely
 considered: by that statute the action is not given to the
 party for his particular damage; but the action given is
 a popular action, only the party grieved hath a pre-

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ference for six months: but if he do not sue in that time, every man else is at liberty to recover the same sum.

(2) The other point of damage, is the pains and charges he was put unto, and that is not occasioned by the sheriff, but by the deliberation of the House. Why should the sheriff pay for that? It may be, if the parliament had sent for the sheriff the first day, and blamed the double return, he would have ventured to determine the matter speedily, and there should have been no cause of complaint for delay; but the parliament saw so much cause of doubt, that they think it not fit to put the sheriff to determine, but resolve to examine the matter, and give him directions that may guide him in mending his return; thereupon they give a day to the parties on both sides, and finding the matter of long examination, and withal difficult, they deliberate upon it.

It seems very unreasonable the sheriff should be made pay for this, which he did not occasion; but was a course taken by the parliament for their own satisfaction, who found no fault in the sheriff for putting them to all that trouble.

Suppose Sir Samuel Barnardiston had been returned alone, and the Lord Huntingtower had petitioned against that return, there had been the same charge to have defended that return; so that it was the contest of the opposite party that occasioned the charge, the deliberation of the parliament that occasioned the delay; but neither of them can be imputed to the sheriff.

I cannot difference this case from the case of bringing an action against a jury, for maliciously, knowingly, and on purpose to put the party to charges, finding a matter specially, whereby great delay and great expenses were, before the party could obtain judgment; and yet I think no man will affirm that an action will lie in that case.

In this case the damages are found entire, so that if both parts, viz., the not sitting in the house, and the

pains and charges are not actionable causes of damages ; it will be intended the jury gave for both, and so the judgment is for that cause erroneous.

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I suppose the wages of parliament will not be mentioned for damages, for in most places they are only imaginary, being not demanded (*x*) ; but if there were to be any consideration of them, it will not alter this case ; for upon this return they are due as from the first day, and so no damage can be pretended upon that score (*y*).

5. My fifth reason is drawn from the statute of 23 Hen. 6, which has been so often mentioned. That statute is a great evidence to me, that no action lay by the common law against a sheriff for a false return of a writ of election to the parliament ; and this evidence is much strengthened by the observation that hath been

(*x*) See 1 Hall. Const. Hist. Eng., 8th ed., p. 264 ; 4 Inst. 16. Campbell, Lives of Chan. iv. 270.

(*y*) "Time was, when it was doubted, where a man was elected and the officer refused to return him, whether the person elected was damaged or not. It is very certain, heretofore, persons were not so ambitious of sitting in this house as now they are ; and some persons purchased charters of exemption, to be excused sitting in this house ; and so it had been practiced in the House of Lords. It was not reckoned a damage that any person was not returned a burgess to sit here, but a kindness ; but they did not hold so in the case of an elector. Every body agrees, as the electors had a right to choose, so there was no statute to compel them so to do ; but they looked upon it not only as their right, but their interest, to be present at the elections. And none can say but it is a

man's interest, to make choice of such a person to serve in parliament (who hath the power over his estate, and life too for aught I know), as he could trust. Nobody ever doubted that a person who had a right to vote had an interest, and might be damaged if his vote was refused . . . I would say one thing as to the damnification of the persons elected ; there is a late Act (7 & 8 Will. 3, c. 7, cited *post*) that gives double damages where the return is contrary to the last determination. Now, I do take it, that Act supposes that a man might have been damaged before ; and if he was damaged before, he was so by the common law, for no statute gives him any damages. It is true, that statute gives double damages, but still that statute supposes there was a damage before, and builds upon that foundation." Per Sir J. Hawles, 14 St. Tr. 729 ; *et vide per* Mr. Cowper. *Id.* 758.

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made, that never any action was brought otherwise than upon that statute.

I must admit, that if an action lay by the common law, this statute hath not taken it away, for there are no negative words in the statute; but it is not likely that the parliament would have made that law, if there had been any remedy for the party before.

The statute observes, that some laws had been made before, for preventing false returns, but there was not convenient remedy provided for the party grieved; and therefore gives him an action for 100*l*. If the courts of justice had, by the common law, jurisdiction to examine misdemeanors concerning the returns of sheriffs to parliament; what needed the parliament to be so elaborate, to provide law after law, to give them power therein, and at last to give the party grieved an action? Can any man imagine but that the parliament took the law to be, that the party was without remedy? I know preambles of acts of parliament are not always gospel; but it becomes us, I am sure, to have respect to them, and not to impute any falsity or failing to them, especially where constant usage speaks for them.

It has been objected that, in those times, it was reckoned a damage to be returned to serve in parliament, which is the reason that no man then did bring his action against the sheriff for returning another in his stead. This cannot be true, for the statute calls him the party grieved, and is careful in providing convenient remedy for him; and we see by the many statutes about those times, that it was a mischief very frequent, and there wanted no occasion for those actions; which does extremely strengthen the argument of the non-user of this pretended common law.

An action upon the case, where it may be brought, is a plaster that fits itself for all times and all sores; and if such an action might then have been brought, there was no need for the parliament to provide a convenient remedy.

In *Buckley v. Thomas* (z), which appears to be so elaborately argued both at bar and bench; if this common law had been thought upon, they might have prevented the question whether the sheriffs of Wales were bound by the statute 23 Hen. 6, c. 15.

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It seems plain to me, that the makers of the said statute were ignorant of this common law; and yet my brother Thurland observes, the judges in those times usually assisted in the penning of the laws (a).

The judges and counsel in the time of *Buckley's Case* were ignorant of this common law, else it would have been mentioned in the argument in that case.

This common law was never revealed, that I find, until a time that there were divers other new lights: I mean those times, when Neville brought an action for a false return against Stroud during the late troubles (b); but, in those times, it could never obtain judgment; I have heard that the Court of Common Pleas sent the record to the parliament, as a case too difficult for the courts of common law to determine.

The statute of 23 Hen. 6 is not only evidence that no such action lay at the common law; but, in my opinion, is not consistent with any remedy at the common law, unless it be allowed that the parties should be doubly punished.

If the party grieved has brought his action upon the statute, and recovered, it was admitted by counsel, that no action can be brought at common law; nor *à contra*, can he recover by the statute, after he has recovered by the common law, because *nemo bis punitur pro eodem delicto*.

So far it stands well; but suppose the party grieved has let slip his time of three months and then a third person brings a popular action and recovers 100*l.* upon the statute; there is nothing can bar the party grieved

(z) Plowd. 118.

(a) *Ante*, p. 384.

(b) 2 Sid. 168.

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from his action at common law, for his sitting still will not conclude him; no statute of limitations extending to this case. And if it be so, then must the party, besides his fine and imprisonment, be doubly punished by this statute; which was made, as the letter of it imports, because there wanted convenient remedy.

And now I am discoursing of this statute, I must observe the great wisdom of the course of parliament in these cases, which hath in great measure prevented the bringing actions against sheriffs, even upon this statute.

Where the sheriff mistakes the person in his return, he incurs the penalty of the statute of 23 Hen. 6, though it be without malice; and it may happen that anywhere there are 21 electors of one side, and 20 of the other, the sheriff returns him that hath 21, and the parliament adjudging an incapacity in two of the 21, may determine he that had the 20 voices was duly chosen. In such case the sheriff had made a false return, within the penalty of the statute of 23 Hen. 6, and no evidence shall be given against the determination of the parliament.

This was a very hard case for the sheriff; and if he were liable to such a mischief, many a past sheriff might be awakened, that takes himself to be secure.

But the course of parliament prevents this, as it is reason; for immediately upon their determinations, they send for the sheriff, and cause him to amend his return; and thenceforward the amended return is the sheriff's return; and there is no record that can warrant any action to be brought for a false return; as when the marshal of the King's Bench or Warden of the Fleet has made an improvident return, omitting some causes where-with the prisoner stood charged in his custody, whereby he became liable to action, he frequently moves the Court to amend the return; and when the return is amended, all is set right, for there is no averring against a record; in like manner, when the sheriff hath amended

his return, he is secure from any action upon that occasion.

By this means, there has of late years been no recovery upon the statute, because all persons choose rather to compel the sheriff to amend his return, that they might be admitted to sit in the House, than to take their remedy upon the statute; and no man can recover upon the statute first, and have afterwards the return amended: for I have been told, that by the course of parliament, unless the petition be lodged within some few days after the return, it cannot be received afterwards. So that a man cannot upon that statute have remedy at law, and also in parliament; which seems to be wisely provided, to prevent any contrariety of determinations.

This statute of 23 Hen. 6 furnished those that argued for this action with one argument, which doth now vanish. They said that all the inconveniences that could be objected to this action, were the same upon the statute of 23 Hen. 6, viz., that upon that statute, the right of election must be examined upon a trial, where there might be a contrariety of determinations; for it appears by what I have said, that there can be no contrariety of determinations.

And there are other inconveniences in this remedy by the common law, which are not in the remedy given by the statute; for by the statute the sum to be recovered is limited: the informer hath a time prefixed, so that there are bounds set which cannot be exceeded; but the remedy by the common law is without limitation of time, which is considerable; for all sheriffs that ever made any return otherwise than the parliament determined, will be liable, during their whole lives, to them that will call them to account for it. I say, this is without limitation of time, without measure of damages, or any rules contained in a written law: It depends upon a general notion of remedy, which may be enlarged by construction, as it is now introduced without precedent.

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To finish my observation upon this statute, I say it is great wisdom in the parliament to call the sheriff to amend the return, and so prevent any remedy against him upon the statute of Hen. 6, for I do not see that the rules of law concerning elections are so manifestly clear and known, that it is fit that the sheriff should, upon all returns that are corrected by the parliament, pay the reckoning of the contest.

6. I have a sixth reason against this action ; which is because the sheriff is not admitted to take security to save him harmless in such cases ; I take this reason to be *instar omnium*, and there needs no other in the case.

It were the most unreasonable and grievous thing in the world that sheriffs should be bound to act without any deliberation, and not be allowed to take any security ; and yet be liable to an action, which way soever he takes : there is no course can avoid it but this of a double return, as I have before shewn.

It has not been said, by any that argued the other way, that the sheriff may take security : and, I suppose, will not be said ; for it would be a dangerous course for parliaments, for then the most litigious man must be returned and not he who is truly chosen.

If the sheriff may not take security, the law must be his security. It was an argument used by my brother Ellis, that because the law imposes an officer, to wit, the sheriff, therefore the law must give the party an action against that officer, if he misdemean himself : the argument does not hold universally, for the law imposes a judge, and yet no action lies against him. But the reason of that argument, if turned the other way, is irrefragable ; as thus, the law will not suffer the sheriff to take a security, therefore the law must be his security, else it were a most unreasonable law. This reason of itself is sufficient to bear the whole case ; for no case can be put in our law, nay, no case can be in any reasonable law, where a man is compelled to judge without

deliberation, and cannot take security, and yet shall be liable to an action.

I have two more reasons to add, upon which I lay great weight, though they depend not upon any particular circumstances of this case, but the general consideration of it.

(1) That it is a new invention.

(2) That it relates to the parliament.

(1) As it is a new invention, it ought to be examined very strictly, and have no allowance of favour at the end; and it will have the same fortune that many other novelties, heretofore attempted in our law, have had.

Actions upon the case have sometimes been received in new cases, where it stands with the rules of law, and no inconvenience appears; but they have been more often rejected. I shall instance some cases that have been rejected, because it will be manifested by them, that all the arguments and positions laid down by my brothers that would support the action, are as well applicable to several cases that have been already rejected, as to the case at bar.

An action upon the case was brought against a grand-juryman, for falsely and maliciously conspiring to indict another, and adjudged it would not lie; against a witness for testifying falsely and maliciously; and an action was brought against a judge for acting falsely and maliciously; but adjudged that no action would lie in those cases.

These three instances are applicable to every argument urged for this action. The arguments my brothers made in depressing falsity and malice, those which they made from the comparison of other actions upon the case *a minori ad majus*, the argument, that because the law imposes the officer, it will punish the malice, have the same force in the case of a judge, juror, or witness: and yet my brothers admit in those cases, an action will not lie, which shews the invalidity of those arguments.

Now I shall give other instances where actions upon

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the case have been rejected for novelty and reasons of inconvenience.

An action on the case was brought against the lord of a manor for not admitting a copyholder, and it was adjudged it would not lie (c). There was a verdict found, and damages given by the jury in that case; the lord is compellable in chancery to admit a copyholder; and what harm would it have been if there might have been a remedy given by the common law, there being a custom broken by which the lord was bound? The reasons of the books are, because it was a novelty, and it would be vexatious if every copyholder should have an action against the lord, when he refused to admit him upon his own terms.

It has been adjudged that an action upon the case will not lie for the breach of a trust, because the common law cannot try what a trust is; but if such actions were allowed the law might declare that to be a trust, which the Court of Chancery, that properly judges of trusts, might say is none; and where the common law cannot examine the principal matter, the damages that were but dependent upon it should not be regarded.

Anthony Maddison brought an action against Skipwith, for maliciously killing Sir Thomas Wortley: the case was thus: The plaintiff was a young lawyer that had expended all his gains in the purchase of a rent that was determinable upon the death of Sir Thomas Wortley; Skipwith quarrelled with Sir Thomas Wortley in the streets about a mistress, and killed him, whereby Maddison lost his rent. It was held the action would not lie, though it were laid to be done maliciously, on purpose to determine the plaintiff's rent.

I observed in that case, that although Mr. Maddison knew very well that there was a mistress in the case, and that the rent was not aimed at, yet he would fain try his

fortune in the suit: thinking that a jury, perhaps out of compassion to him, or to discourage the like facts, might make the manslayer pay him for his loss: but the judges would not suffer it to go on, it being a mere device and a new-fangled action (*d*).

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It hath been held, that an action will not lie against a parson for suing for tithes in kind, knowing that there was a *modus*, because it might then be perilous for any parson to insist upon his right.

It was held by the Court of Common Pleas that no action will lie for suing an attorney, knowingly, in any other court against his privilege; for his means to enjoy his privilege, is to claim it by writ of privilege; and he is not bound to claim his privilege, nor can his adversary know he will claim it.

An action was lately brought in the King's Bench, (as I have heard) for delaying a post-letter maliciously, whereby the plaintiff wanted intelligence that might have been of great advantage to him. The Court discountenanced the action, so that it proceeded no further. It was then said (as I heard) to this effect: That if such precedents were admitted, there could hardly be any

(*d*) Lord Holt, in *Ashby v. White*, (Judgm., ed. 1837, p. 33,) thus comments upon and distinguishes the case, *supra*. "One man hath an annuity for the life of another, and a third person kills him upon whose life the annuity depends, whereupon the man brings an action against the manslayer. It was held no action lay." to which the following answers may be given:—

1. "If the manslayer be a murderer he is past an action, because he is to be hanged, which is a very compendious way in law to defeat any man of an action; but if the manslayer be no murderer, but only guilty of manslaughter, then there is not

that ground of action as in this case, for there was no malice, which is the ground of this action."

2. "There is no trust in him that kills the man upon whose life the annuity depends to take care of or preserve his life, but there is a trust in the defendants as officers to allow every elector his right of voting."

3. "The true answer is that every man who hath an estate determinable upon another man's life, hath it subject to those casualties that are incident to mankind, that occasion as well violent as natural death, and therefore he that hath interest depending thereupon must be contented therewith."

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dealing or correspondence, but might be matter for actions at law; and although the case depend upon proof of particular malice, and the defendant will be acquitted if his case be not odious; yet we must consider that there is both charge and vexation of mind that attend the defence of a just cause, and we must not subject men for all their actions to such trouble and hazard.

These instances shew, that although an action upon the case be esteemed a *catholicon* (e), yet when actions have been applied to new cases, they have always been strictly examined, and upon considerations of justice or inconvenience they have been many times rejected.

For though the law advances remedies, yet it is with consideration that vexation be not more advanced than remedy.

It is my opinion, that no new device ever was, or can be introduced into the law, but absurdities and difficulties arise upon it which were not foreseen; which makes me very jealous of admitting novelties. But,

(2) In matters relating to the parliament, which is my second ground, there is no need of introducing novelties; for the parliament can provide new laws to answer any mischiefs that arise, and it ought to be left to them to do it.

Especially in a case of this nature, concerning elections, which the parliament have already taken care of, and prescribed remedies by the several statutes that have been made concerning them; I say, in such case, there is little need to strain the law.

The judges in all times have been very tender of meddling with matters relating to parliament. I do not find that ever they tried elections, but where statutes give them express power; or that they ever examined the behaviour of a sheriff, or any officer of the parlia-

(e) i.e., "an universal medicine," Johns. Dict., *ad verb.*

ment, in relation to any service performed to the parliament, but upon those statutes ; and in *Bronker's Case* (f), the statute was their rule in the Star-Chamber, and they inflicted the same punishment that is appointed by that statute.

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If we allow general remedies (as an action upon the case is) to be applied to cases relating to the parliament, we shall at last invade privilege of parliament, and that great privilege of judging of their own privileges.

Suppose an action should be brought in time of prorogation, against a member of parliament, for that he falsely and maliciously did exhibit a complaint of breach of privilege to the parliament, whereby the party was sent for in custody ; and lost his liberty, and was put to great charges to acquit himself, and was acquitted by the parliament.

If upon such a case the jury should find the defendant guilty, why should not that action be maintained as well as this at bar ? It may be said for that action, 1st, that the judgment of the parliament is followed, and the privilege is not tried at law, but determined in the House : 2ndly, it may be said, the party has no other way to recover his charges.

It would be dangerous to admit such an action, for then there would be peril in claiming privilege ; for if the party complained of had the fortune to be acquitted by the House, the member that made the complaint would be at the mercy of the jury, as to the point of malice and quantity of damages. Such a precedent, I suppose, would not please the parliament ; and yet it may with more justice be the second case, than this at the bar the first.

Actions may be brought for giving parliament-protections wrongfully, actions may be brought against the clerk of the parliament, serjeant-at-arms, and speaker, for aught I know, for executing their offices amiss, with averments

(f) Dyer, 168, b.

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of malice and damage; and then must judges and juries determine what they ought to do by their officers. This is in effect prescribing rules to the parliament for them to act by.

It cannot be seen whither we shall be drawn, if we meddle with matters of parliament in actions at law. Therefore in my judgment, the only safety is in those bounds that are warranted by Acts of Parliament or constant practice.

Suppose this action had been brought before the election had been decided in the House, and the jury had found one way, and the parliament had determined contrary; how inconsistent had this been!

But it was said in the King's Bench that the Court would not try it, before parliament had determined the election, and then that cannot be contested, but the judgment of the parliament must be followed: And my brother Ellis (g) but now said, "Surely no man will be so indiscreet as to bring such an action before the parliament hath determined it; and the Court will not try it, before such time as the election be determined contrary; how inconsistent had this been!"

But it was said in the King's Bench that the Court would not try it, before the parliament had determined the election, and then that cannot be contested, but the judgment of the parliament hath determined it; and the Court will not try it, before such time as the election be determined in a proper way.

In my opinion this was not rightly considered, for how can the Court stay any suit, to expect the determination of parliament? And what reason or justice is there, that the sheriff, who is no party called to answer in the parliament, should be concluded in anything by a judgment

(g) His words are, "if there be a double return depending in the House no man will bring an action, depending that return undecided, and the judges

will not countenance such an action; so the party is quite deprived of his remedy." 6 St. Tr. 1072—3.

between other parties, to defend himself from a demand of damages in a court of law, where witnesses are examined upon oath, which they cannot be in the Commons House.

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There is no reason the suit of law should stay till the House have determined the election, if the determination of the House be not conclusive in that suit.

And for the discretion of the parties that are like to bring such actions, I cannot depend upon it; for I see in this age, some men will insist upon their private rights to the hindrance of public affairs of higher consequence than any that can come before the Courts in Westminster Hall.

It may be, there will not want men that will press us to judge in such cases; and not only before the parliament have determined, but against what the parliament have determined; and will tell us, that the sheriff was no party, that witnesses were not there examined upon oath, and produce arguments from antiquity which we shall be very loath to judge of.

I can see no other way to avoid consequences derogatory to the honour of the parliament, but to reject the action; and all others that shall relate either to the proceedings or privilege of parliament, as our predecessors have done.

For if we should admit general remedies in matters relating to the parliament, we must set bounds how far they shall go, which is a dangerous province; for if we err, privilege of parliament will be invaded, which we ought not any way to endamage.

This I speak of general remedies: Now I will consider this particular case, which, in my opinion, would bring great danger and dishonour to the parliament.

It is dishonourable to the parliament that there should be no protection in their service; I have shewn that the sheriff can be safe in no case, if he be sued in such a case as this: And can there be a greater reproach, than that

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there is no safety in^l their service? Nobody can serve them cheerfully and willingly at that rate.

It has been objected that the sheriff is not their officer, but is the officer of the Court of Chancery, which sends forth the writs, and receives the returns. The argument is plausible, but will not pass in the parliament; for they say the Court of Chancery is the repository for their writs, but will not allow them to issue without warrant from the House: They will not suffer the Court of Chancery to meddle with the returns of the sheriff. The parliament sends immediate order to the sheriff; if the return be too slow, they direct the sheriff to amend his return, and they punish the sheriff where they find him faulty; so that it appears they exercise an immediate jurisdiction over the sheriff. And I suppose they would judge it very false doctrine to say, that the Court of Chancery, or we, can any way meddle with the returns or the officer.

Admitting the sheriff to act in returns as the officer of the parliament, it concerns them that he should be liable to no other punishment but what they inflict, otherwise they cannot be expected to be obeyed.

To have others judge when their servants do well, will be to have others give rules to their servants and service, which they will think inconvenient.

Let it be considered how hard a task sheriffs have in the elections of knights to the parliament: The appearance commonly is very numerous, the parties contesting very violent, the proceeding tumultuous, the polling sometimes is at several places at once: so that the sheriff can hardly be a witness of the action; and if the dispute be in the House of Commons, he is no party to it. If after all this, the sheriff, who cannot indemnify himself by security, still be liable to an action, the service of the parliament may be reckoned a miserable slavery; which is not for their honour.

As this is dishonourable, so it is dangerous to parliaments; it concerns the kingdom that returns to the

parliament should be upright and impartial, and, that they may be so, the sheriff should be secure from all fears.

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Judges are not liable to actions, that they may proceed uprightly and impartially; if they were subject to suits for their judgments, there is that earnestness and confidence on both sides, that one side would be dissatisfied and trouble them, and they could not discharge their duty without apprehensions of disquiet (*h*).

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If the sheriff be exposed to actions thus, let us consider what and whom he is to fear: He may fear the suit of the party, and he may fear the suit of the king. And it follows necessarily, that if an action lies, an information for the king will also lie for the misdemeanor in his office. If it be not a case privileged by the complexion of it, as parliamentary, from being examined in Westminster Hall, but that he may be punished at the suit of the party, he may certainly as well be punished at the suit of the king: If so, where is the sheriff's security? Will his own innocence secure him? That must be tried by a jury of the county where the parliament sits: who are, it may be, strangers to him, as well as to the matter; or by a jury of the county where the election was, where, it may be, they will be of an opposite party; the plaintiff may wait his opportunity, and question him twenty years after: And if he be condemned, his punishment is unlimited, a fine may be set to any height for the king, and damages may be given to any value for the party. Where is his security upon such proceedings? Will he not be more afraid of such punishment out of parliament, than of any punishment in parliament? Will not, nay, may not his terror make him desire to please them that can punish him out of parliament, rather than to do right? Will not that be dangerous to the constitution of parliaments?

As the punishment out of parliament may be a terror

(*h*) See *Kemp v. Neville*, ante, p. 736, and Note thereto.

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to those who mean well, so colourable punishments may be as mischievous on the other side ; for they may prevent any punishment in parliament, for *nemo bis punitur pro eodem delicto* ; they may serve for protection of men that do ill. When it is seriously weighed, of what consequence this may be, the case at bar will not be thought a case fit to be received by the judges without the countenance of a new law.

They object, here is malice found by the verdict, and there can be no danger or inconveniency that malice should be punished.

This objection fortifies my opinion : for malice upon which they would have the scales turn in this case, is not a thing demonstrative, but interpretative, and lies in opinion ; so that it may give a handle to any man to punish another by.

The instance of this very case shews, that a good man may reasonably be afraid of the event of his defence in such a case.

For although the matter was of great examination in parliament, and at last decided but by few voices, and no observation of the sheriff's miscarriage there ; though it appeared upon the trial (which I may say, being present there,) that the sheriff was guided by the advice of his friends, of counsel, and of parliament men, that told him the only safe course was to make a double return : yet the jury condemned him to pay 800*l.* against the expectation of the Court ; for the judges that were present at the trial did all declare publicly, that they would not have given that verdict.

The judges heard all the evidence the jury could go upon ; for being of a remote county to the place of election, the jury could know nothing of their own knowledge, and yet the judges concurred not with the jury in their opinion.

I know we are not to examine the truth of the verdict, we must take it for gospel ; neither doth any partiality

in this particular lead me in judgment : but I shew it as an instance that malice is not demonstrative ; men's minds may be mistaken, and innocent men may therefore have reason to be afraid, especially in ill times, and may use such means for their safety as may not be convenient for parliaments.

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But there can be no danger or inconvenience in the censure of parliament, that represents the whole kingdom, who hitherto have alone exercised this power, and who may at any time reform the law, if the present practice be any way inconvenient.

Upon these reasons which I have produced, I ground my opinion : now it will be necessary to weigh what hath been said in opposition to it.

The arguments urged on the other side, related either to the ingredients or circumstances of this action, or to the foundation or substance of it.

I call the ingredients and circumstances of the action, that it is laid with these words, *falso, malitiose, deceptive, et scienter* : and that there is a verdict in this case, and damages are found.

The words *falso, malitiose, et deceptive*, will sometimes make a thing actionable, which is not so in itself, without malice proved, though there be the same damage to the party.

As where a man causes another to be falsely indicted, yet if it be not *malitiose*, no action lies ; though there be the same trouble, charge, and damage in one case as the other.

But it is only where a man is a voluntary agent ; for if a man be compellable to act, you cannot molest him upon any averment of malice : as if a grand-juryman causes another to be indicted, though you aver malice, you cannot have an action against him ; so for a witness that doth testify, or a judge that judgeth.

In the case at bar, the sheriff is compellable to act, and not barely as a minister to send the indenture, but

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as a judge to say which is the major part of the due electors ; and if he mistakes, there is no reason it should subject him to an action upon an artificial averment of malice.

I remember in *Shepherd v. Wakeman* (i), Wyndham, J., said well (k) that the words *falso et malitiose* were grown words of course, and put into every action : so that to his knowledge juries many times had no regard to them ; that he looked upon them as words of form.

If we should make the words *falso et malitiose* support an action without a fit subject matter, all the actions of mankind would be liable to suit and vexation : they that have the cooking (as we call it) of declarations in actions of the case, if they be skilful in their art, will be sure to put in the words *falso et malitiose*, let the case be what it will ; they are here pepper and vinegar in a cook's hand, that help to make sauce for any meat, but will not make a dish of themselves.

Falso et malitiose will not enable an action against a judge.

Nor against an indictor or witness (l), nor where words are not actionable, though the plaintiff hath a verdict and damages found ; nor for a breach of trust, which is *alieni fori*.

The reason of every one of these cases holds in the

(i) 1 Keble, 255, 269, 308, 326.

(k) 1 Keble, 269 ; *Id.* 309.

(l) Lord Holt, in *Ashby v. White*, Judgment (Ed. 1837), p. 32, considers the objection, that "if one perjures himself in a cause to the damage of another person who is either plaintiff or defendant, no action upon the case lies," to which he thus responds : — "Nor is it reason it should, for perjury is a crime of so high a nature that it concerns all mankind to have it punished, which cannot be in an

action upon the case where nothing but damages shall be recovered by the party injured, which is not sufficient to secure the public against so dangerous a creature who hath offended against the common justice of the kingdom. Therefore, for example's sake and public security, the prosecution of such an offence is vested in the Crown."

See further, as to the liability of a witness, Broom's Comm. C. L., 6th ed., p. 756.

case at bar : therefore it ought to have the same resolution.

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As to the word *scienter*, it hath weight sometimes ; and if an action be brought for keeping a dog that worried another's sheep, *sciens canem ad mordendum oves esse consuetum* (m), or for detaining the servant or wife of another, *scienter* (n) ; in these cases, if the defendant hath been told that the dog did worry sheep, or that it was the servant or wife of another, though it may be he did not believe it, yet it was *scienter* ; for the word implies no more than having notice : and in those actions he must inform himself at his peril, and may, if he doubts, avoid danger by putting away those things which give offence. But in this case he could receive information by none, and is not to believe or misbelieve anybody, but is bound to judge of the thing himself, and to act according to his judgment ; so that no proof could be made of the *scienter*, for one side tells him the election was one way, and the other side tells him it is the other way ; but he being present to the whole action, must follow the dictates of his own judgment. Hence it appears, *scienter*, in this case, is an empty word not referring to notice of a fact, but a matter of judgment, which cannot any way be proved.

It has been often urged that this case is stronger by being after a verdict and damages found by the jury ; and it has been said, that perhaps upon a demurrer it might have been found more doubtful.

The case is the same to me upon a verdict that it would have been upon a general demurrer, and no stronger ; for a demurrer is the confession of the party,

(m) By stat. 28 & 29 Vict. c. 60, s. 1, the owner of a dog is rendered liable in damages "for injury done to any cattle or sheep by his dog," without proof of "a previous mischievous propensity in such dog, or the owner's

knowledge of such previous propensity, or that the injury was attributable to neglect on the part of such owner ;" and see 34 & 35 Vict. c. 56.

(n) See Broom's Comm. C. L., 6th ed., p. 849.

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of all that can be proved, or can possibly be found upon that declaration.

It is my Lord Coke's advice (o) never to demur to a declaration, if there be any hopes of the matter of fact; for the matter in law will as well serve after a verdict as upon a demurrer.

It had been a very odious case, if the sheriff should have admitted all this fact to be true by a demurrer.

The finding the plaintiff's damages adds no strength to the case; for we see every day upon actions for words, though the jury find the defendant guilty for speaking words *fulso et malitiose*, and find it to be to the plaintiff's great damages; yet if the words are not such as will bear an action, the Court stays judgment; and if judgment happens to be given, it is reversible for error; which shows that the finding damages by the jury cannot make an action better than if it were to be adjudged upon demurrer.

I shall now consider what hath been said to maintain this action upon the main substance and foundation of it. They say, this is a case within the general reason of the common law, for here is malice, falsity and damage; and where they concur there ought to be remedy. And although this be a new case, it ought not for that reason to be rejected; for other kinds of action have been newly introduced, and this is as fit to be entertained as any.

My brothers that argued even now for the action, shewed great learning and great pains; and certainly have said all that can be invented in support of this case; but as far as I could perceive, they have spoken only upon general notions to that purpose I just now mentioned; but nothing that I could observe applicable to the reasons and differences I go upon.

As for the rule they go upon, that where falsity, malice

(o) *Cromwell's Case*, 4 Rep. 14. a.

and damage do concur, there must be remedy ; I confess it is true generally, but not universally, for it holds not in the case of a judge, nor an indictor, nor a witness, nor of words that import not legal slander, though they are found to bring damage, as I have shewn before. And the reasons that exempt these cases from the general rule, have the same force in the case at bar.

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I must confess the judges have sometimes entertained new kinds of actions, but it was upon great deliberation, and with great discretion, where a general inconvenience required it (p).

But in the case at bar, neither the peace of the kingdom, nor the course of justice is concerned in general, but only the administration of officers of the parliament, in the execution of parliamentary writs ; and can never happen but in time of parliament, and must of necessity fall under the notice of the parliament ; so that if the law were deficient, it is to be presumed the parliament would take care to supply it : discretion requires us rather to attend that, than to introduce new precedents upon such general notions that cannot govern the course of parliament.

My brother Atkins said, the common law complied with the genius of the nation (q) ; I do not understand the argument. Does the common law change ? Are we to judge of the changes of the genius of the nation ? Whither may general notions carry us at this rate ? For my own part, I think, though the common law be not written, yet it is certain, and not arbitrary. We are sworn to observe the laws as they are, and I see not how we can change them by our judgments ; and as for the genius of the nation, it will be best considered by the

(p) Citing *Smith v. Crashaw*, Cro. Car. 15, where it was held that an action on the case, in the nature of conspiracy, was maintainable for falsely and maliciously causing

the plaintiff to be apprehended, committed to prison, and indicted for treason.

(q) *Ante*, p. 804, n. (g).

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parliament, who have power of the laws, and may bring us to a compliance with it.

In the case at bar, I look upon the sheriff as a particular officer of the parliament for managing elections, and as if he were not sheriff; I look upon the writ as if it were an order of parliament, and had not the name of a writ; I look upon the course of parliament, which we pretend not to know, to be incident to the consideration of it; so that it stands not upon the general notion of remedy in the common course of justice.

The arguments of the falling of the value of money, whereby the penalty of 100*l.* provided by the 23 Henry VI. is become inconsiderable; and the increase of the estimation of being a member of parliament; if they were true, are arguments to the parliament to change the law by increasing the penalty, but we cannot do it.

My brother Maynard, in his argument, would embolden us; telling us we are not to think the case too hard for us, because of the name or course of parliament: for judges have punished absentees; they may determine what is a parliament, what is an act of parliament, how long an ordinance of parliament shall continue, and may punish trespasses done in the very parliament.

I will not dispute the truth of what he said in this, but if his arguments were artificial, he might have spared them; for they have no manner of effect to draw me beyond my sphere.

I will not be afraid to determine any thing that I think proper for me to judge; but seeing I cannot find the courts of justice have at any time meddled with cases of this nature, but upon express power given them by acts of parliament, I cannot consent to this precedent; I am confident when there is need, the parliament will discern it, and make laws to enlarge our power, so far as they shall think convenient.

I see no harm that sheriffs in the meantime should be safe from this new-devised action, which they call the

common law; if they misdemean themselves, they are answerable to the parliament, whose officers they be, or may be punished by the statute made for regulating elections.

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It is time for me to conclude, which I shall do by repeating the opinion I at first delivered, viz., That this judgment is not warranted by the rules of law; that it introduceth novelty of dangerous consequence, and therefore ought to be reversed. *Sæpe viatorem nova, non vetus, orbita fallit* (r).

Soon after the Revolution, Sir Samuel Barnardiston brought his writ of error in the House of Lords, to reverse the reversal of the judgment given in the Exchequer Chamber; but the House on June 25, A.D. 1689, affirmed the reversal of the said judgment.

Writ of
error in
Dom: Proc:

Under their final judgment thus pronounced, however, the House of Commons were, according to Sir Joseph Jekyll (s), so uneasy, and the injury which might result to the public from false and double returns was so manifest, that the legislature shortly afterwards interposed to apply a remedy. And by the statute 7 & 8 Will. 3, c. 7 (t), it was enacted (u), "That all false returns wilfully made of any knight of the shire, &c., or other member to serve in parliament are against law, and are hereby prohibited; and in case that any person or persons shall return any member to serve in parliament for any county, &c., contrary to the last determination in the House of Commons of the right of election in such county, &c., that such return so made shall, and is hereby adjudged to be a false return."

7 & 8 Will. 3,
c. 7.

Also by s. 2 it was further enacted, "That the party grieved, to wit, every person that shall be duly elected to

(r) 4 Inst., 34.

(s) *Proceedings in Ashby v. White*,
14 St. Tr. 751.

12 & 13 Will. 3, c. 5, and made perpetual by 12 Ann. st. 1, c. 15.

(u) Sect. 1.

(t) Continued for eleven years by

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c. 7.

serve in parliament for any county, &c., by such false return, may sue the officers and persons making or procuring the same, and every or any of them at his election in any of his Majesty's Courts of Record at Westminster, and shall recover double the damages he shall sustain by reason thereof, together with his full costs of such suit."

By s. 3, "To the end the law may not be eluded by double returns," it is also enacted, "That if any officer shall wilfully, falsely and maliciously return more persons than are required to be chosen by the writ or precept on which any choice is made, the like remedy may be had against him or them, and the party or parties that willingly procured the same, and every, or any of them, by the party grieved, at his election."

By s. 4, "All contracts, promises, bonds and securities whatsoever hereafter made or given, to procure any return of any member to serve in parliament, or anything relating thereunto," shall "be adjudged void;" and "whoever makes or gives such contract, &c., or any gift or reward, to procure such false or double return, shall forfeit the sum of 300*l.*," recoverable "by action of debt, bill, plaint, or information," within the space of two years after the cause of action shall have arisen (*x*).

And by s. 5, "For the more easy and better proof of any such false or double return," the clerk of the Crown for the time being is required to enter in a book, to be kept for that purpose in his office, every single and double return of any member to serve in parliament, and also every alteration and amendment of such return, to which book free access may be had by any person on payment of a reasonable fee. And the party prosecuting any such suit as above mentioned, may at the trial thereof give in evidence such book so kept, or a true copy thereof, relating to any such false or double return, and shall have the

like advantage of such proof as he might have had by producing the record itself, "any law, custom, or usage, to the contrary notwithstanding."

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"The parliament hath three powers," observes Sir R. Atkins (y); "(1) a legislative power, in respect of which it is called the three estates of the realm; (2) a judicial power, in respect of which it is called *magna curia*, or the High Court of Parliament; (3) a counselling power, whence it is called *commune concilium regni*." Also Sir Robert Sawyer, Attorney-General, remarks in *Fitzharris's Case* (z), that "there are three things to be considered of the parliament—the legislative part, matters of privilege, and the judicial part." For the legislative part and matters of privilege, both Houses do proceed only *secundum legem et consuetudinem Parliamenti*, but for the judicial part, does any man question but that in all times they have been guided and directed by the statutes and laws of the land? And the Lords, in all writs of error, and all matters of judgment, proceed *secundum legem terræ*, and so for life and death. And there is not one law in Westminster Hall as to matters of judgment, and another in the court of the Lords above.

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"Every court of justice," says Sir E. Coke (a), "hath rules and customs for its direction; so the high court of parliament *suis propriis legibus et consuetudinibus subsistit*. It is *lex et consuetudo parliamenti* that all weighty matters in any parliament moved concerning the peers of the realm or commons in parliament assembled,

(y) *Arg. Sir W. Williams's Case*,
13 St. Tr. 1410.

(z) 8 St. Tr. 315.
(a) 4 Inst. 15.

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ought to be determined, adjudged, and discussed by the course of the parliament, not by the civil or by the common law." And this remark may be illustrated by two cases in Lord Coke's Reports (*b*), under the head of "Parliament," which are introduced with this remark, that "the privilege, order, or custom of parliament, either of the Upper House or of the House of Commons, belongs to the determination or decision only of the court of parliament." In the first of these cases (27th Henry VI.) was involved a question between two peers as to precedence, which was referred to the judges, who in giving their opinion upon it nevertheless protested that this was a matter of parliament belonging to the king's highness, and to the lords spiritual and temporal in parliament assembled, by them to be decided and determined. In the other case (31st Henry VI.) the facts were of this kind: an action of trespass was brought in the Exchequer by the Duke of Buckingham against Thorp, then Speaker of the House of Commons, which resulted in a verdict for the plaintiff, with heavy damages, and in the arrest of the defendant in execution; afterwards, application was made by the Commons to the Upper House that their Speaker might be restored to liberty, in order that he might exercise his functions; and this matter being referred to the judges, they replied that they ought not to answer such a question, "for it hath not been used aforetime that the justices should in anywise determine the privilege of the high court of parliament, but every court shall decide upon the privileges and customs of the same."

Accepting Lord Coke's remark above cited that the

high court of parliament subsists by its own laws and customs, it may yet be that this remark, although correct when applied to the internal regulations and proceedings of parliament or of either House, is not necessarily so as regards any power which it may claim to exercise over the rest of the community (c). A privilege of parliament, perfectly undeniable as existing within the walls of parliament, may yet not extend beyond them, so as to license or legalize an act *primâ facie* illegal there done. No action, for instance, can be brought against a member for words uttered by him when debating in the House, yet he may be made responsible in respect of the same words uttered beyond its walls (d). Members of the House, it may be admitted, will be free from liability to action in respect of orders issued by them as members to be executed out of the House, but it does not therefore follow that the officers executing such orders will be irresponsible: the ordinary rule being that a servant cannot shelter himself behind the illegal orders of his master, the mere circumstance that an act complained of was done under the order and authority of the House of Commons cannot *per se* excuse that act, if in its nature illegal.

Obviously, then, as well in regard to the question—Does an asserted parliamentary privilege exist? as in

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(c) As to the distinction between privileges of parliament *ab intra*, which concern the parliament or either House *in concreto*, or the members of parliament within their Houses, and personal privileges, see Judgm., *Benyon v. Evelyn*, O. Bridgm. 334, and *Bradlaugh v. Gossett*, 12 Q. B. D. 271; 53 L. J., Q. B. 209.

(d) *R. v. Crewey*, 1 M. & S. 273; S. C., Holt, N. P. C. 628; *R. v. Lord Abingdon*, 1 Esp. 226; *et vide per* Lord Campbell, C. J., in *Davison v. Duncan*, 7 E. & B. 233; *per* Cockburn, C. J., *Wason v. Walter*, L. R., 4 Q. B. 95; 38 L. J., Q. B. 42, and *Ex parte Wason*, L. R., 4 Q. B. 573; 38 L. J., Q. B. 302.

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regard to the question—Is an act done beyond the walls of parliament within its protection?—the courts of Common Law may be called on to decide. And in view of our procedure by appeal to the House of Lords, an objection to the remedy by action under circumstances such as adverted to has ere now been urged of this kind—Inasmuch as the House of Lords is the ultimate tribunal of appeal, if redress by action were allowed, the effect would be to concede to another branch of the Legislature the power of adjudicating on the privileges of the House of Commons, and of neutralizing or destroying the rights and liberties incident to that body.

As exemplifying the nature of the above objection, the following case may be imagined:—Suppose that a member, against whom judgment has been recovered, and an order for committal under the Act of 32 & 33 Vict. c. 62 made (*e*), is arrested while entering the House of Commons, and that the judgment creditor is committed for contempt and breach of privilege by order of the House;—suppose further, that the person thus committed brings his action of trespass against the officer who took him into custody, and that judgment having been given against the plaintiff in such action by reason of the privileges of the House—such judgment were afterwards questioned on appeal. The House of Lords would thus be constituted a Court of Appeal, in regard to the privileges of the House of Commons, which would lie wholly under the power or at the mercy of the Lords (*f*).

Again, as argued by the Lords in their Address to the

(*e*) Sect. 5.

(*f*) See *per* Mr. Brewer, *Proceed-*

ings in Ashby v. White, 14 St. Tr. 712.

Queen on the commitment of the five Aylesbury men (*g*),
 “It has been held as an undeniable maxim, that whoever
 executes an illegal command, to the prejudice of his fellow
 subjects, must be answerable for it to the party grieved.”

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“Let it be supposed, then, that an action of false imprisonment was brought against the serjeant of the House of Commons, and that the defendant justifies his taking the plaintiff into custody, by virtue of a warrant of that House, and it appears upon the face of the warrant that the cause of the commitment was no crime in law, and the plaintiff demurs, what must the judges do in such a case? Will it be possible for them to avoid examining into the commitment, and so give judgment one way or other? Or can it be pretended, that a writ of error may not be brought upon such a judgment? And is not the court, before which the writ of error is brought, under a necessity to do justice thereupon, as the law requires?” (*h*). In the case here put, also, a collision might ensue between the two branches of the Legislature.

Not only between the two Houses of Parliament, it has been strongly argued, might a collision be brought about if the privileges of the Commons could be discussed and adjudicated upon in the course of an ordinary action, but a collision might likewise be induced between the House of Commons and the Courts of Law.

It has been said—and, for the honour of our legal system, we may hope it has been truly said—that where a man has a right and a wrong is done him, he is somewhere to have a remedy. But the same law which settles

*Ubi jus ibi
 remedium*

(*g*) 14 St. Tr. 861, 870.

mitment of the five Aylesbury men.

(*h*) See the Address of the House
 of Lords to the Crown upon the com-

14 St. Tr. 870.

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the right and declares the wrong, determines where the remedy is to be had. Indeed, as recently remarked by a learned judge (i), this maxim would perhaps “be more intelligibly and correctly stated, if it were reversed, so as to stand ‘where there is no legal remedy there is no legal wrong.’” The suitor at all events must go to the place which the law directs for his remedy, not where he himself might desire it. “We have,” says Lord Coke (j), “several jurisdictions, some ecclesiastical, some temporal, some governed by one law, some by another, and all must have their rules and bounds, which must be observed.”

It is true that the same act may possibly give rise to criminal and to civil proceedings—it may constitute a wrong to the public and likewise an injury, causing damage, to an individual. Subject, however, to this peculiar exception, the rule is said to be that no man ought to have on foot against him two judgments at once in two several courts, whereby one may punish him for doing a thing, and the other, at the same time, for not doing it—so that, to use the forcible expression of a learned parliamentary speaker (k), he would be “crucified between them” (l).

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A collision between the two Houses of Parliament was in the Principal Case, as we have seen, happily averted through the instrumentality of Chief Justice North; such a collision, however, actually did occur in the well-known case of *Ashby v. White* (m), which also exemplifies

(i) See *per* Stephen, J., *Bradlaugh v. Gossett*, 12 Q. B. D., at p. 285.

(j) 4 Inst. Pref.; *Id.* 14, 15, cited *per* Sir Thos. Powys, 14 St. Tr. 715; *ante*, p. 238.

(k) Sir Thomas Powys, 14 St. Tr. 722.

(l) See the *Case of the Sheriff of Middlesex*, *post*.

(m) 2 Lord Raym. 1105; S. C., 1

the possibility of a conflict, much to be deprecated, between the Commons in Parliament assembled and the Courts of Law.

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The plaintiff (*n*) there declared that on the 26th of December, 12 Will. III., a writ issued out of Chancery, directed to the sheriff of Bucks, reciting that the king had ordered a parliament to be held at Westminster, on the 6th of February following. The writ commanded the sheriff to cause to be elected for the county two knights, for every borough two burgesses, which writ was delivered to the sheriff, who made a precept in writing under the seal of his office, directed to the constables of the borough of Aylesbury, commanding them to cause two burgesses of the said borough to be elected, &c., which precept was delivered to the defendants to whom it belonged to execute the same; by virtue of which writ and precept the burgesses of that borough, being summoned, did assemble before the defendants to elect two burgesses: and, they being so assembled in order to make such election, the

Salk. 19; 2 *Id.* 503; 3 *Id.* 17; 6 Mod. 45; Holt, N. P. C. 524, 526; 1 Brown, P. C. 45; 1 Sm. L. C., 8th ed., 264.

See also *The Proceedings in the Great Case of Ashby v. White*, 14 St. Tr. 695—888.

(*n*) Before the above action was brought there had been a resolution of the House of Commons, That the right of election for the borough of Aylesbury, was in the inhabitants not receiving alms. The plaintiff, Ashby, being an indigent person, and coming to settle in Aylesbury, the overseers of the poor there warned him out of the parish, unless he would give security to save it harmless, and to that purpose complained to the

next justices of the peace, to get an order to remove him; whilst this matter was in controversy, the election for burgesses of parliament came on, and Ashby offering himself to be polled, the constables (the defendants) refused to receive him to poll, being, in their opinion, no settled inhabitant there, nor having ever contributed to the church or poor, either before or since the election. After the election was over, Ashby brought his action on the case against the constables, on the ground that he was an inhabitant of that borough, not receiving alms; and that the constables, falsely and maliciously, obstructed and hindered him from giving his vote at the election there. 14 St. Tr. 747.

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plaintiff being then a burgess and inhabitant of that borough, being duly qualified to give his vote at that election, was there ready, and offered his vote to the defendants for the choice of Sir Thomas Lee, Bart., and Simon Mayne, Esq., and the defendants were then required to receive and admit of his vote. Yet they, being not ignorant of the premises, but contriving and fraudulently and *maliciously* (o) intending to damnify the plaintiff, and to defeat him of his privilege, did hinder him from giving his vote, and did refuse to permit him to give his vote, so that the two burgesses were elected without any vote given by the plaintiff, to his damage of 200*l.*, &c.

Upon Not Guilty pleaded, the cause went to trial, and a verdict was given for the plaintiff, with 5*l.* damages and costs.

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A motion was afterwards made in the Court of Queen's Bench, to arrest the judgment, on the ground that the action did not lie; and after argument, Lord Holt, C.J. (differing from Powell, J., Powys, J., and Gould, J.), delivered his opinion (p) that judgment should be given for the plaintiff: because, I. The plaintiff, as a burgess of Aylesbury, had a legal right to give his vote at the election. II. As a necessary consequence thereof, and incident thereto, he must have a remedy to assert, vindicate, and maintain it. III. The remedy pursued by the plaintiff was the proper remedy, being supported

(o) Such an averment of malice is essential to the maintenance of such an action, *Tozer v. Child*, 6 E. & B. 289; S. C., 7 *Id.* 377; *per* Blackburn, J., *Pease v. Chaytor*, 3 B. & S. 628. See *Pryce v. Belcher*, 3 C. B., 58; S. C., 4 *Id.* 866; *Cullen v. Morris*, 2 Stark,

N. P. C. 577, and cases there cited; *Drewes v. Coulton*, 1 East, 563 (a); *Harman v. Tappenden*, 1 East, 555.

(p) The abridgment of Lord Holt's Judgment in the text is made from the edition of that judgment, A.D. 1837.

by the grounds, reasons, and principles of our ancient Common Law.

I. As to the first ground of his judgment, Lord Holt observed :—The Commons of England have so considerable a share in the property of the nation that they thence became entitled to an equal share in the legislature of the kingdom, without whose consent no tax can be imposed, nor law enacted. By reason, however, of the vast number of individuals constituting the commonalty, the function of legislating could not be discharged by them personally, therefore our constitution provided that a convenient and proportionate number from amongst themselves should by them be chosen and appointed, and be invested with a plenary authority to deliberate, advise, and determine for themselves and those who sent them. For which purpose the realm was divided into several districts, under several and distinct considerations—the counties returning knights, the cities citizens, and the boroughs burgesses to parliament, the right of electing knights of the shire belonging to and being inherent in the freehold—the right of electing burgesses belonging in some cities and towns to the real estate of the inhabitants, and in others being vested in the corporation for the benefit of the particular members who are the electors. In any case, however, the possession of the franchise is to be deemed a benefit and advantage to its possessor (*q*) ; so that :—

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(*q*) In the Report of the Committee of the Lords upon the Writ of Error in the above case, the following passage occurs (14 St. Tr. 783—4) :—

It is certainly a great advantage for the inhabitants of a place “to choose persons to represent them in

parliament, who thereby will have an opportunity and be under an obligation to represent their grievances, and advance their profit.

“Of this opinion have two parliaments been, as appears by two several Acts, the one 34 & 35 Hen. 8, c. 13,

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II. He must have a legal remedy to assert, maintain, and vindicate it. Would it not look very strange to the rational part of mankind who either know or ever heard of our ancient English constitution, if—being so founded that the Commons of England have an undoubted share in the legislative authority, which is to be managed and exercised by their representatives chosen from and by themselves, every freeholder of 40s. *per annum*, having a right to vote for a county, every citizen for a city, and every burgess for a borough—the sheriff or other officer who is to cause the election to be duly made, hinder, disturb, or deprive any of these electors of his right, and nevertheless the person injured have no remedy? The injury being done to a right upon the security whereof the lives, liberty, and property of all the people of England so much depend.

the other 25 Car. 2, c. 9. The first is an Act for making knights and burgesses within the county and city of Chester, which begins in this manner, In humble wise shew to your Majesty the inhabitants of your grace's county Palatine of Chester, that they being excluded and separated from your high court of parliament, to have any burgesses within the said court, by reason whereof the inhabitants have hitherto sustained manifold losses, and damages, as well in their lands as goods and bodies: Therefore it was enacted, that they should have knights for the county and citizens for the city of Chester. The other Act, which constitutes knights and burgesses for the county Palatine, and city of Durham, recites, that the inhabitants thereof hitherto had not that liberty and privilege of electing and sending knights and bur-

gesses to the High Court of Parliament.

"The application of these two Acts is very plain; the first saith, to be excluded from sending knights and burgesses to parliament, is a damage to lands, goods, and body; the other saith, that it is a liberty and privilege to send them.

"Thus the right of election is explained, and shewed to be a legal right. That of electing knights of shires, belonging to and inherent in the freehold. The other, of electing burgesses, is belonging in some cities and towns to the real estates of the inhabitants: and in others, is vested in the corporation, for the benefit of the particular members, who are the electors; the having of which is a great benefit and advantage to the people thereof, and will prevent the loss and damage that otherwise would ensue."

When a law requires one to do any act for the benefit of another, or to forbear the doing that which may be to the injury of another, though no action be given in express terms by the law for omission or commission, the general rule is that the party so injured shall have an action. The same reason holds where the common law gives a right, or prohibits the doing of wrong; but in this case an Act of Parliament is not wanting, for the statute of Westminster I. (*r*), enacts (*s*) that elections shall be free. If he that hath a right to vote be hindered by him that is to receive his vote, that election is not free; but such an impediment is a manifest violation of the statute, and an injury to the party whose vote is refused.

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The statute of Westminster I. shews what opinion the King, Lords spiritual and temporal and Commons in parliament had of the great consequence it was to the whole realm, that people should have their freedom in choice; and though the common law was the same before, as appears even by the statute itself, the words whereof are, "And because elections ought to be free," yet it was judged high time to add the sanction of an Act of Parliament thereunto:—"The king commandeth upon great forfeiture that no great man or other, by force of arms, nor by malice or menaces, shall disturb any to make free election."

"Indeed," continues Lord Holt, "I do not find that the defendants did by force of arms drive the plaintiff away from the election, nor by menaces deter him; but I find they did maliciously hinder him; and so it is charged by the plaintiff in the declaration, and so found

(*r*) 3 Edw. 1.

(*s*) C. 5.

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by the jury, that they did it by fraud and malice ; and so the defendants are offenders within the very words of the statute of Westminster I. And surely where the law is so clear as to the right, and so strictly enjoined by Act of Parliament to be observed, it seems a great presumption to make it but a light thing."

"It being apparent, then, that the plaintiff had a right, and the defendants have done him wrong, and that, by consequence of law, he must have some remedy to vindicate his right, and to repair the wrong :—

III. "I come in the third place to shew that the remedy the plaintiff hath pursued by bringing this action, is the proper remedy allowed by the ancient law of England."

The law in all cases of wrong and injuries hath provided proper and adequate remedies. If a man hath a franchise, and is hindered in the enjoyment thereof, an action lies, which is an action upon the case. The plaintiff in this case hath a privilege and a franchise, as he is possessor of the borough-land or house, and the defendants have disturbed him in the enjoyment thereof, even in the most essential part, which is his right of voting. The precept the defendants received from the sheriff was founded upon the king's writ, and these defendants are commanded to cause to be elected two burgesses for the borough of Aylesbury, of which they are to give notice, and to admit every one that hath a vote to make use of it. If they refuse any to vote that hath a right, they act contrary to the duty of their office.

There was an objection made that it doth not appear that the persons for whom the plaintiff tendered his vote were elected, nor that they would have been elected if his vote had been admitted. I answer, it is not material

whether the persons for whom he voted were chosen, or would have been chosen if he had had his vote. His right and privilege is to give his suffrage, to be a party in the election, and if he be excluded from thence he is wronged, though the parties for whom he would have given his vote were elected.

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Then by way of answer to the objection that the plaintiff had sustained no damage, Lord Holt replied that "every injury imports damage in the nature of it," and cited the following authority:—

The plaintiff stood to be one of the bridgemasters of London Bridge, which officer was elected in a common hall, and, the plaintiff and others being candidates, the question was which had the greatest number of votes? The plaintiff demanded a poll, the defendant, being the Lord Mayor of London, refused it. It was then determined that an action was maintainable for refusing the poll, which can be supported only upon this account, that the plaintiff had a right to have it, as every candidate hath, though if he had had it, it might have been against him; but the denial of the right was a good ground of action (*t*).

Now to say that there is no such injury or damage as will support the action in this case, is to beg the question, for it is most apparent, by what hath been said, that the plaintiff hath been injured in being denied his right; it lies on the other side to shew any particular reason that may affect this case, and it has been objected as follows:—

1st objection: That this would be the occasion of many actions.

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Answer. If that be so, there is the greater reason to support this action to punish the many wrongs that have been done, which will prevent any more of the like nature. If offences multiply, remedies against them ought to be advanced. If other officers of boroughs have been guilty of the like misfeasances as these defendants, it is fit they should be as liable as these defendants to make satisfaction. The only means to hinder corruptions that are so frequent among officers of boroughs and corporations, is to let them know that they are obnoxious to the law, and that their purses must make satisfaction to all whom they may injure in this manner.

It is very true, if one act that tends to the injury of many persons be committed, no one person injured shall be allowed to have an action because the rest might have the same (*u*). But in this case none can have any action but the party grieved whose vote was denied, the others whose votes were admitted are not concerned; and if the officer denies a hundred who have right, there are a hundred several wrongs, for which he will be liable to a hundred several actions. But surely this is so far from being an objection, that it is a strong argument to support the action; for if the mayor or bailiff of a borough have liberty to refuse men who have votes, he will easily have a majority to vote on his side; and then what will become of our elections? This would give an opportunity to officers to be partial and corrupt, and to return divers persons to parliament, who would have possession of seats there for some time, and would have voices in

(*u*) Citing *Co. Litt.* 56, a; *Williams's Case*, 5 Rep. 72; *Pineux v. Hovenden*, Cro. Eliz. 664, see further

as to this doctrine, 1 Sm. L. C., pp. 312, 313, 8th Ed.

the making of laws and imposing of taxes, until the right of election could be determined. And though the plaintiff, upon hearing of the cause in the House of Commons, might have his voice allowed him, yet this would not compensate for the mischief that might be done to the kingdom in the meantime by the votes of those partially returned, and who were not the representatives of the people entitled to choose them.

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The rule against multiplying actions (continued Lord Holt) is confined to acts where there is another remedy to be had; but besides this action the party injured has no other remedy; no indictment lies because it is a personal wrong to the party, and no wrong to the public, but as an evil example, and as tending to the encouragement of other such officers to commit the like transgressions.

2nd objection: That never such action has been brought.

Answer 1. "For aught I know," said Lord Holt, "this is the first occasion that ever was given, for I never heard that any man was so presumptuous as to proceed or act against apparent right as these defendants have done."

It is not the novelty of the action which can be urged against it, if it can be supported by the old grounds and principles of the law. The ground of law is plain and certain, indeed universal, that where any man is injured in his right by being either hindered in, or deprived of, the enjoyment thereof, the law gives him an action to repair himself. The law of England is not confined to particular precedents and cases, but consists in the reason of them (*x*), which is much more extensive than

(*x*) "The law of England would be a strange science indeed if it were decided upon precedents only. Precedents serve to illustrate principles and to

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the circumstance of this or that case—*ratio legis est anima legis et ubi eadem ratio ibi idem jus*.

An action upon the case was brought against the mayor of a town for refusing the plaintiff's vote at the choice of a new mayor, and there never was any scruple made, but that the action did well lie (*y*). There can be no difference between that and this case, unless it be supposed that the right to vote at the election of a mayor is of higher estimation in the eye of the law than a right to choose members to serve in the High Court of Parliament. "A mayor of a town is to govern the electors according to law, which if he doth transgress, he must make satisfaction for the injury; but a parliament man, in conjunction with others, hath an absolute power over life, liberty, and property of every elector."

This action is not only founded upon the reason of the common law, but it hath the sanction of an Act of Parliament, viz., the Statute of Westminster II. (*z*).

Lord Holt then observed that the defendant was neither a judge nor like a judge (*a*), but only a ministerial officer to execute the Queen's writ, viz., to assemble the electors to make the election by receiving their votes and computing their numbers, to declare the election, and to return the persons elected.

His lordship then proceeded to maintain that the case *sub judice* was proper in the nature of it to be determined in the Queen's courts, "which will be apparent if

give them a fixed certainty; but the law of England, which is exclusive of positive law enacted by statute, depends upon principles;" *per* Lord Mansfield, C. J., *Jones v. Randall*, Cowp. 39.

(*y*) *Heming v. Beale*, 2 Lev. 250.
(*z*) C. 24.

(*a*) With this compare what is said by North, C. J., in the Principal Case, *ante*, p. 806.

the right of electing the first order of representatives, viz. knights of the shires, be considered, which is founded upon the elector's freehold. Matters of freehold are determinable originally and primarily in the Queen's courts by the rules and methods of the common law, by jurors upon oath, upon the evidence of witnesses also sworn; and as the right of the freehold is determinable there, so are all benefits, rights, and advantages depending thereupon or belonging thereunto. And if a freeholder's voice should be refused by the sheriff, what could hinder but that the Queen's courts should try and determine this matter by a jury, upon the oaths of witnesses or evidences in writing, whether the plaintiff that supposes himself wronged was a freeholder or not?"

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The franchise of a citizen and burgess depends either upon usage, prescription, or custom, or letters patent, which also are primarily and originally cognizable by the Queen's courts.

Then by the statute 7 & 8 Will. 3, c. 7 (b), the officer is to return him elected who is chosen according to the last determination of the House of Commons. That settles the right of election. Now suppose the officer denies a man a vote who, according to the last determination therein, has, or ought to have, one, and this the mayor or bailiffs well knew; what hinders him that had right, according to that determination, from bringing his action against the officer who hath injured him? It cannot be the Act of Parliament, for the Queen's courts are by law the first and original expounders of the statutes of the realm.

There is no other place, court, or jurisdiction appointed

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by the law of England for determining this right or repairing this injury but one of the Queen's courts of Westminster. No man ever applied to Parliament complaining that he was debarred of his vote when he had a right thereunto. Sometimes some of a borough have complained that persons have been returned by their officer who were not duly elected, which is an injury done to the whole community, and brings the rights and merits of election into question. So if one complains that he was elected by a majority, and that another was returned, this also brings the merits into question, of which that House has cognizance, and therefore as incident and necessary thereunto, they must try the right of electors, which of them by custom or letters patent have voices. But because the House of Commons may determine who are electors and who are not, in order to try the right of election, it does not follow that when the right of election is not in question they shall try the right of an elector; the one is only *hæc vice*, the other is a freehold or franchise. Who hath a right to be in the parliament is properly cognizable there, but who hath a right to choose is a matter originally established and settled before there is a parliament assembled (c).

(c) During the Debate in the House of Commons originating out of the above case, Mr. Lowndes observed (14 St. Tr. 734), that from "the beginning of the reign of Queen Elizabeth, it hath been a standing rule in the House of Commons, in the beginning of every parliament, and every session, to appoint a committee to examine all matters concerning elections;" and, he adds, "if those committees have from time to time proceeded to ex-

amine the right of electors, and this House hath proceeded from time to time to give judgment in such cases, sometimes according to general qualifications settled and adjusted in the House, and very frequently upon examining and considering the rights of particular voters; then I think we have as good authority for the jurisdiction of this House, in the matter of these elections, as can be had for anything whatsoever."

When the right of the candidate is examined it is upon this account—whether this or that candidate hath the right to be in their company, and to join with them in the making and forming of laws; and they, as the great conservators of the people's rights, will not permit any to join with them who is not truly a representative of the place for which he pretends to be chosen. The merits of an election may properly be enquired of by the House of Commons, for they only can give the most effectual remedy by excluding the usurping member, and giving the possession of the place to him who has the right.

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The House of Commons cannot, however, take cognizance of particular men's complaints; there is matter of greater importance for them to employ themselves about, the *ardua et urgentia negotia regni* (as the writ says), the safety and defence of the king and kingdom; and therefore, though this be a case that in consequence concerns the lives and liberties of the subjects of England, yet in regard the law hath provided for it, it is to be pursued in the ordinary and common methods of justice, without giving Parliament so much trouble to the interruption of their greater affairs.

Again—the House of Commons cannot give satisfaction in damages (*d*).

3rd Objection. The last objection is that such an action is a breach of the privilege of the House of Commons.

(*d*) Mr. Tankred, a member of parliament, complained to the House of a breach of privilege against one Morris for having intercepted letters sent to Mr. Tankred by the post. The House, having heard Morris and his witnesses, resolved, that there was no ground of complaint of breach of pri-

vilege, and ordered that Morris should be discharged from further attendance and that he should be paid the costs of his attendance by Mr. Tankred. Comm. Journ. 20 Jan., 9 Will. 3; 14 Feb., 10 Will. 3; cited and commented on 14 St. Tr. 738, 744.

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Answer. Privilege is no bar to any action; an action may be delayed and proceedings thereupon obstructed by reason of privilege, but that ever any legal remedy was taken away by privilege is without precedent.

That certainly can never be esteemed a privilege of Parliament which is incompatible with the right of the people, which is to have reparation for injuries done to their rights and franchise, according to the ordinary course of justice, *i.e.*, on trial by jury, where the witnesses who give evidence are upon their oaths (*e*).

Surely none will say that if a man be injured in such a manner as the plaintiff in this action hath been, he may *per legem terræ* have a remedy for satisfaction and asserting his right in the House of Commons. This remedy must be either by statute law or common law; no statute gives him such a remedy, nor does the common law, for not one precedent can be produced that any man upon such an occasion applied himself to the House of Commons for relief.

Writ of
error.

Judgment having being given for the defendants in the above action by the majority of the Court of Queen's Bench, error was brought upon it in the House of Lords, where, on the 14th of January, 1703, such judgment was reversed (*f*) upon the grounds above set forth by Lord Holt (*g*). And consequent on these proceedings occurred the famous debate in the Commons House, which resulted in certain Resolutions (*h*), of which the more important are as follows:—

I. That according to the known laws and usage of Par-

(*e*) Citing Magna Charta, cap. 29.

(*f*) 1 Brown, P.C. 45.

(*g*) See the Report of the Lords' Committee upon the Proceedings on

Error in *Ashby v. White*, 14 St. Tr. 778, *et seq.*

(*h*) Comm. Journ., vol. xiv., p. 308; Parl. Hist., vol. vi., p. 300.

liament, it is the sole right of the Commons of England in Parliament assembled, (except in cases otherwise provided for by Act of Parliament,) to examine and determine all matters relating to the right of election of their own members.

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II. That according to the known laws and usage of Parliament, neither the qualification of any elector, nor the right of any person elected, is cognizable or determinable elsewhere, than before the Commons of England in parliament assembled, except in such cases as are specially provided for by Act of Parliament.

III. That the examining and determining the qualification or right of any elector, or any person elected, to serve in Parliament, in any court of law, or elsewhere than before the Commons of England in parliament assembled, (except in such cases as are specially provided for by Act of Parliament,) will expose all mayors, bailiffs, and other officers, who are obliged to take the poll, and make a return thereupon, to multiplicity of actions, vexatious suits, and insupportable expenses, and will subject them to different and independent jurisdictions, and inconsistent determinations in the same case, without relief.

IV. That Mathew Ashby having, in contempt of the jurisdiction of this House, commenced and prosecuted an action at common law against William White and others, the constables of Aylesbury, for not receiving his vote at an election of burgesses to serve in Parliament for the said borough of Aylesbury, is guilty of a breach of the privilege of this House.

V. That whoever shall presume to commence or prosecute any action, indictment, or information, at common law, which shall bring the right of the electors, or persons

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elected to serve in Parliament, to the determination of any other jurisdiction than that of the House of Commons (except in cases specially provided for by Act of Parliament), such person or persons, and all attorneys, solicitors, counsellors, and serjeants at law, soliciting, prosecuting, or pleading in any such case, are guilty of a high breach of the privilege of this House.

Paty's Case.

After the above Resolutions of the House of Commons an execution issued out of the Court of Queen's Bench against the defendants White and others, at suit of Ashby, upon his judgment in the House of Lords, and the defendants were taken in execution. John Paty, also, another of the Aylesbury men, commenced an action similar to that at suit of Ashby, against the same defendants, and having, in pursuance of a resolution of the House of Commons, been committed for a contempt in so doing, brought his writ of *habeas corpus* in the Queen's Bench (*i*), but, by the majority of the judges of that court differing in opinion from the Lord Chief Justice Holt, was remanded; the ground of remand being that the court had not cognizance of the matter brought before it, the House of Commons being exclusively judges of their own privileges.

Paty's Case,
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Lord Holt, in delivering his opinion (*k*) upon this occasion, animadverted upon the assumption of power by the House, to restrict by resolution the known rights and liberties of the people. "If this commitment," said he, "in the case of these men shall be determined to be warranted by the laws and customs of this realm, it will be a rule in all other cases within the same reason, which

(*i*) *Reg. v. Paty*, 2 Lord Raym. 1109; S. C. Salk, 503; 14 St. Tr. 849. (k) See Lord Holt's Judgment, ed. 1837, p. 41.

is in truth when either House of Parliament shall make a menacing declaration, that whoever shall presume to do such or such acts (though in themselves never so legal or justifiable), shall be judged and esteemed to be an infringer or transgressor of the privilege of that House, and so to be subject to the censure thereof: which proceeding is not according to the constitution of the kingdom, which admits no such power or authority to be exercised and administered, but by the whole legislature.

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“Neither House of Parliament hath power, no, not both together, to dispose, limit, or diminish the liberty or property of the subject, because by law (which is superior to the actions or determinations of either House) that liberty and property are established and cannot be diminished or infringed by a less authority than the legislature of the kingdom, which is the Queen, the Lords, and Commons assembled in Parliament.”

Adverting also to the final decision in *Ashby v. White*, and the Resolutions of the House of Commons having reference thereto, Lord Holt further observed, that the Commons had thus asserted a jurisdiction superior to the Parliamentary jurisdiction legally exercised and administered in the House of Lords, which is the *dernier ressort* for litigating parties appointed by the law and constitution of England.

If indeed the Lords were on any occasion to administer their judicial power contrary to those rules of law to which they are obliged to adhere, it cannot be doubted but the Commons might take notice thereof, in a parliamentary manner—might demand conferences or prepare a bill to declare the law. But to fall upon the subject who follows a judicial precedent, made in the high Court of Parliament, for a breach of privilege to the other

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House, is to make the constituent parts of the Government inconsistent, and to contradict the main end thereof, in which all parts should concur to secure the liberty and property of the subject, and not render those rights uncertain and precarious.

No declaration of either House, said Lord Holt, can bind the subject or create any new privilege, for then it would have the force of an Act of Parliament, and bind the person and property of the subject, which are free, unless restrained or limited by the legislature of the kingdom, which none can pretend is vested in the House of Commons.

"It hath been said by my brothers and the rest of the judges of the two other Courts (*l*) that each House is judge of its own privileges, exclusive of all other Courts." I must agree that when a privilege of either House is broken, complaint for that breach must be made in that House whose privilege is broken, for no other court upon any such complaint can take cognizance thereof. But if a question concerning privilege arise in any cause depending in the Queen's Courts, that Court hath power to proceed thereupon, and to determine that point.

"It is not denied that the Commons are judges of their privileges, but they have not power to enlarge them nor to create new (*m*). The judges in the Queen's Courts are judges of the law, but have no power to make law."

Lord Holt having thus in *Paty's Case*, reaffirmed propositions such as he had stated in *Ashby v. White*, and relied upon the final judgment there given, as absolving

(*l*) Who had been consulted in the matter, and unanimously agreed with the majority of the Court of Queen's Bench.

(*m*) See May Parl. Prac., 9th ed. p. 73, citing 14 Comm. Journ. 555 and 560.

Paty on the charge of breach of privilege, concluded thus :—" The liberty of the subject hath been secured and asserted by many Acts of Parliament (n). There is no precedent of any such commitment before this time for bringing any action, unless against a privileged person and in the time of privilege. Now if the judges, because of the name of privilege, though there is nothing of the nature of it, cannot judge of the legality of the commitment, then it is and ever will be in the power of the House of Commons, when they please, to deprive the Queen's Courts of that jurisdiction which they have for the relief of the subject.

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"When the people qualified do elect their representatives, they give them power and authority to act legislatively, not ministerially or judicially, for therein the laws have made sufficient provision ; and where there is a defect in the law, they have authority, if the Queen and the Lords shall agree with them, to supply that defect, but they have no power of themselves to do anything. Consider what this declaration hath done. It hath asserted a power in them to restrain and diminish that liberty of the subject which is secured to every one by the fundamental laws and constitution of the kingdom. It hath also assumed an authority to abridge, limit, and deprive the Queen's Courts of their jurisdiction in relieving the subject from arbitrary and illegal imprisonments. It tends to deprive the subject of the aid and assistance of his counsel, agents, and attorneys, to assert and maintain his right by the methods and rules of law, which is an exercising of an arbitrary and despotic domination that is foreign to the laws of England ; for such proceedings were

(n) Citing Magna Carta, c. 29.

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never used or exercised here until the year 1640. He that is supposed to commit a breach of privilege, is in a worse condition than any one that is under an accusation of the highest crime, which is high treason; for even before the statute (*o*), it was lawful to assist such person to make a fair defence, though not to speak for him in open Court."

Paty having, in accordance with the opinion of the majority of the Court of Queen's Bench, been remanded to prison, petitioned the Crown for a writ of error upon that judgment returnable in the House of Lords, and thereupon ensued the memorable debates in Parliament, and discussions between the two Houses, which were eventually set at rest by a prorogation.

Lord Holt's opinion in *Barnardiston v. Soame* was against the action:—1st, Because a double return is no return that the law takes notice of, but is only allowed of by the custom of parliament; 2ndly, Because in case of doubt the course of parliament admits of a double return; therefore, when the returning officer doubts, and returns the result of the election as doubtful, and so submits to the judgment of the House of Commons, which has jurisdiction in the matter, it would not be reasonable for the law to suffer an action to be brought against the officer.

The final decision in *Ashby v. White* seems to be clearly reconcileable with that in the Principal Case upon grounds stated by Lord Holt (*p*) in characteristic language as follows:—"Objection. That the elected shall not have an action, yet the elector, who it may be is but a cobbler, shall, is very unreasonable."

(*o*) 7 & 8 Will. 3, c. 3.

(*p*) Judgm. ed. 1837, p. 29.

“Answer. The law hath no respect to person. He is (though a cobbler) a free man of England, and to be represented in parliament.”

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“Objection. That this matter is triable *per legem et consuetudinem parliamenti*.”

Ashby v.
White re-
concilable
with the
principal
case, *per*
Lord Holt.

Answer. That is asserted but not proved; rather the contrary doth appear; for this is a right not founded upon the law and custom of parliament, but an original right, part of the constitution of the kingdom as much as a parliament is; the persons selected to serve in parliament derive their authority from, and can have no other but that which is given to them by those who have the original right to choose them.

Objection. The House of Commons has jurisdiction to try the right of the election of its own members.

Answer. It is very true, it has; but that the House has power to try or determine the right of other persons who are not its members, and do not pretend to be so, cannot be justified by any precedent or usage. This objection, however, is enforced, by saying that the Commons cannot determine the right of the election unless they also determine the right of the elector. To which it may be answered, That oftentimes is so, though not always; but taking it for granted to be so, it is only *pro hac vice*, and cannot conclude an elector who has a right, because he is not a party to the suit; his right comes not there in question originally, but consequentially in a cause litigated between other persons, and it is not agreeable to the principles of law that the right of one man should be conclusively determined in a cause between others wherein he is no party (*q*).

(*q*) *Res inter alios acta alteri nocere non debet*: See Broom's Leg. Max. 6th ed. p. 908.

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Such are the reasons assigned by Lord Holt as reconciling his opinion in *Ashby v. White* with that held by him in the Principal Case; nor need difficulty be felt about admitting that there is in truth no conflict between the cases.

More difficult might it be to reconcile the conduct of the Commons in reference to the Aylesbury election, with the course which had previously been pursued by them in obtaining from the House of Lords a reversal of the judgment pronounced by the King's Bench against Denzil Holles and others, on an information preferred by the Crown for acts done by them as members of the Lower House, and within the walls of parliament. *Anno* 5 Car. I., criminal proceedings were instituted in the King's Bench against Sir John Eliot, Holles, and Valentine (r) for seditious words spoken in parliament, and for forcibly detaining the Speaker in the chair for the purpose of preventing an adjournment. To the information thus exhibited, a plea to the jurisdiction was put in, because "these offences are supposed to be done in parliament, and ought not to be punished in this Court or in any other, but in parliament." This plea, however, was overruled, Hyde, C. J., observing that all the judges of England had determined that "an offence committed in parliament, criminally or contemptuously, the parliament being ended, rests punishable in another Court;" and Croke, J., adding, "If such an offence be punishable in another Court, what Court shall punish it but this Court, which is the highest Court in the realm for criminal offences? And *perhaps* (s) not only criminal actions

(r) 3 St. Tr. 293; Cro. Car. 181.

(s) See 2 Hall. Const. Hist. Eng.,
p. 7.

In the conference between the two Houses concerning freedom of speech in the year 1667, Mr. Vaughan, on

committed in parliament are punishable here, but words also." The plea to the jurisdiction having been overruled, and the defendants declining to put in any other plea, judgment by *nil dicit* was given against them, and heavy fines were imposed.

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Shortly after the Meeting of the Long Parliament (A.D. 1641), it was by them, *inter alia*, resolved (t) that the exhibiting of the information above-mentioned was a breach of privilege, and that the overruling of the plea to the jurisdiction, the judgment and sentence of the Court were also "against the law and privilege of parliament." Now, had the Commons remained satisfied with this assertion of their rights, no argument could have been drawn from it adverse to their privileges. This matter was, however, in the reign of Charles II. (A.D. 1667) again agitated, when the Commons, relying upon the stat. 4 Hen. 8, c. 8 (u), as a general enactment, again voted that the judgment against Eliot and others was illegal, and having obtained the concurrence of the Lords in this vote, a writ of error was, at the suggestion of the Upper House, brought by Mr. (then become Lord) Holles, upon the said judgment, and it was formally reversed.

It cannot surprise us that amongst the reasons assigned for reversing the judgment of the Queen's Bench in *Ashby v. White* stress should have been laid by the Upper House upon the course thus adopted by the Com-

behalf of the Commons, admitted as "very possible" that the above plea to the jurisdiction was not sufficient as regarded the "criminal actions" alleged against the defendants in the information. See 3 St. Tr. 318.

(t) 3 St. Tr. 312.

(u) This Act specifically concerned

one Richard Strode, and protected him from suits in respect of what he had done in parliament; it likewise contained general words which the House resolved, on the occasion mentioned in the text, to be declaratory of the ancient rights and privileges of parliament.

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mons less than half a century before. So little jealousy did the Commons then entertain of any encroachment on their privileges by the higher branch of the legislature, that they themselves "resorted to the judicature of the Lords, in the manner that has been mentioned, upon so weighty an occasion" (x).

Few instances are found of actions, whether at common law or upon the statute of William III., brought against returning officers; and from none such, save those already noticed, can any inference be drawn of much practical value or importance.

Cases in
pari
material.

In *Nevill v. Stroud* (y), below abstracted, no final judgment was pronounced, and *Onslow's Case* (z), where the action was for a double return, was decided by North, C.J., and other judges, in conformity with the Principal Case, upon the ground that the Court had no jurisdiction of the matter (a).

In *Wynne v. Middleton* (b) the action was brought upon

(x) 14 St. Tr. 798.

(y) 2 Sid. 168, where the facts were as under:—Mr. Nevill, having stood as a candidate to represent the county of Berks in parliament, was chosen by a majority of votes, but not returned, and therefore he brought his action against the defendant, who was Sheriff of Berks, in the Common Pleas: That action depended there some time, and thereupon the justices brought the record into the House of Commons for difficulty, and desired the House would come to a determination in it. This being in the time of the Long Parliament, which had assumed the whole legislative, as well as executive power, the record being brought in, the House appointed a day to consider of the

matter, and when they saw the plaintiff had proceeded according to the known methods of law, they gave no judgment in the case, but sent it back to Westminster Hall, where it was again argued, but never adjudged.

(z) 2 Vent. 37; 14 St. Tr. 707; *et vide per* Holt, C.J., *Prideaux v. Morris*, 2 Salk. 503, where the action was for a false return.

(a) In the year 1784 damages were recovered by Mr. Fox in an action against the High Bailiff of Westminster for a false return. See Hughes, Hist. Eng., vol. iii. chap. 28.

(b) 1 Wils. 125. See also *Gough v. Bateman*, 1 Lutw. 184.

the statute 7 & 8 Will. 3, c. 7 (c), for double damages for a false return, and, after verdict for the plaintiff, it was *inter alia* objected,—that double damages can only be recovered in respect of the return being contrary to the last resolution of the House of Commons, and that it did not appear that there had been any last resolution of the House; the majority of the Court of King's Bench, however, held that the action was well brought, and that double damages should be recovered for any false return, and that they were not bound by law to take notice from time to time of the particular resolutions of the House of Commons, who of themselves cannot make a law; and Willes, C.J., added, "But whatever may have been the opinion of judges, I am very clear myself that an action at common law will well lie both for a false or a double return of a member, for there is *damnum cum injuriâ* in both cases." "There would be, I think, the greatest inconvenience if the doctrine should prevail that there must be a determination in the House of Commons as to the election (d) before the action for a false return can be brought, for, if so, it would be in the power of the House to repeal this Act of Parliament by contriving to put off a petition from time to time for two years, within which time this sort of action must be brought. I declare for myself that I will never be bound by any determination of the House of Commons against bringing an action at common law for a false or a double return; and a party injured may proceed in Westminster Hall notwithstanding any order of the House, for the members are not upon oath, nor can they administer an oath to witnesses; and it would be very extraordinary to say that we, who are

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(c) *Ante*, p. 839.

(d) As in the Principal Case; *ante*, p. 802.

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judges upon oath, should be bound by a determination of persons not upon oath; in trying such action for a false return, I would pay great regard to a determination of the House, but yet I would go on" (c).

It has been held that the act of defendant must have been wilful, in order that an action may be maintainable against him under the above-mentioned statute (f).

Further; by stat. 31 & 32 Vict. c. 125, s. 48, it is enacted, that if any sheriff, or other returning officer, shall wilfully delay, neglect, or refuse duly to return any person who ought to be returned to serve in parliament for any county or borough, such person may, in case it has been determined, on the hearing of an election petition under this Act, that such person was entitled to have been returned; sue the officer having so wilfully delayed, neglected, or refused duly to make such return at his election, in any of her Majesty's Courts of Record at Westminster, and shall recover double the damages he has sustained by reason thereof, together with full costs of suit, provided such action be commenced within one year after the commission of the act on which it is grounded, or within six months after the conclusion of the trial relating to such election.

(c) The judicial observations *supra*, though doubtless entitled to regard, as bearing generally on the question, Are the asserted privileges of the House of Commons binding on our Courts of Law?—cannot be weighed against the express language of the statute of Will. III. Fortescue (de Laud. Leg. Ang., p. 117) affirms that "a jury is not, nor can be, bound by any opinion of the House of Commons, nor by any court of law in the world, but that of their own

consciences."

(f) *Burgoyne v. Moss*, cited in *Cullen v. Morris*, 2 Stark. N. P. C., 584, 588-9. In *Pickering v. James*, L. R., 8 C. P. 489, it was held that the duties thrown upon the presiding officer at a polling station under the Ballot Act, 1872 (35 & 36 Vict. c. 33, sched. i. r. 21) are merely ministerial, and an action lies by a party who has lost an election through a breach of such duties without proof of malice or want of reasonable care.

Of actions against returning officers at suit of persons claiming to exercise the franchise, a reference to *Pryce v. Belcher* (g) will suffice. That was an action against the returning officer of the borough of Abingdon, for an alleged infraction by him of the requirements of the 82nd section of stat. 6 & 7 Vict. c. 18; the action failed, however, on the ground that the plaintiff had become disqualified to vote by reason of non-residence. The above is not, indeed, the only instance in modern times of such an action. The principles applicable to it are now well ascertained, and the House of Commons has long ceased to interfere, unless there be circumstances in the particular case affecting the privileges of the House (h). A collision, originating out of such an action, between parliament and our courts of law, though not impossible, is less likely to occur since the abandonment by the House of Commons of its right to determine questions relating to controverted elections of its own members (i), a right formerly guarded by it with extreme jealousy. Petitions relating to such elections are now tried before two judges of the Queen's Bench Division of the High Court of Justice (k), whose determination as to the validity of an election is final to all intents and purposes (l). The House still, however, retains the power to enquire into and decide all questions affecting the legal disabilities of its members not arising upon such petition (m).

Should, however, any such question as referred to arise,

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materid.

(g) 4 C. B. 866; S. C. 3 *Id.* 58.

(h) See the Report of the Select Committee on the Sligo Borough Election, Comm. Journ. vol. cxii. p. 314; *et vide Id.* vol. xxxi. pp. 211, 279, 292-3.

(i) See 31 & 32 Vict. c. 125.

(k) 42 & 43 Vict. c. 75, s. 2.

(l) 31 & 32 Vict. c. 125, s. 11, sub-s. 13; 129 Comm. Journ. 184.

(m) See 31 & 32 Vict. c. 125, s. 50; May, Parl. Prac. 722-5.

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juri
moterid.

a guiding principle may be found in the words of Lord Coke, when he wrote (n), "As the body of man is best ordered when every particular member exerciseth his proper duty, so the body of the commonwealth is best governed when every several court of justice executeth his proper jurisdiction." If the eye, whose duty it is to see—the hand to work—the feet to go—shall usurp and encroach one upon another's work, this will assuredly produce disorder, and bring the whole body in the end to destruction. "So in the commonwealth (justice being the main preserver thereof), if one court should usurp or encroach upon another, it would introduce uncertainty, subvert justice, and bring all things in the end to confusion."

(n) 4 Inst. Pref.

STOCKDALE v. HANSARD; 9 Ad. & E., 1.

(2 Vict. A.D. 1839.)

PRIVILEGES OF THE HOUSE OF COMMONS—THEIR EFFICACY
—HOW FAR OBLIGATORY ON COURTS OF LAW.

It is no defence, at common law, to an action for publishing a libel, that the defamatory matter is part of a document which was, by order of the House of Commons, laid before the House, and thereupon became part of the proceedings of the House, and which was afterwards, by orders of the House, printed and published by defendant; and that the House of Commons heretofore resolved, declared, and adjudged "that the power of publishing such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interests is an essential incident to the constitutional functions of parliament, more especially to the Commons' House of Parliament as the representative portion of it."

When a plea suggests such a defence, a court of law is competent to determine whether or not the House of Commons has such privilege as will support the plea.

THIS was an action on the case, in which the declaration stated that, before and at the time of committing the grievance next complained of, the plaintiff was, and for a long time had been, a bookseller and publisher, and, as such bookseller and publisher, had published divers scientific books, and particularly, in the year 1827, a certain physiological and anatomical book written by a learned physician on the generative system, illustrated by anatomical plates: and, whereas the said defendants, on 1st May, 1836, did publish and cause to be published in a certain book, purporting to be "Reports of the Inspectors of the Prisons of Great Britain," the passage following: "This last is a book" (meaning the said

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physiological and anatomical book) "of a most disgusting nature; and the plates are indecent and obscene in the extreme;" whereas, in truth and in fact, the said book is purely of a scientific character: Yet the said defendants, well knowing the premises, but contriving and maliciously intending to defame and injure the plaintiff in his trade of a bookseller and publisher, maliciously and falsely did publish, and cause to be published, of and concerning the plaintiff, in his said trade and business, in a certain printed paper, purporting to be a copy of the Reply of the Inspectors of Prisons for the Home District, with regard to the Report of the Court of Aldermen, to whom it was referred to consider the first report of the inspectors of prisons as far as relates to the gaol of Newgate, which said copy of the reply purports to be a letter from William Crawford, Esq., and the Rev. Whitworth Russell, inspectors of prisons for the Home District, to the Right Hon. Lord John Russell, &c., the false, scandalous, and defamatory libel following, that is to say,—“But we deny that that book is a scientific work (using that term in its ordinary acceptation), or that the plates are purely anatomical, calculated only to attract the attention of persons connected with surgical science; and we adhere to the terms which we have already employed, as those only by which to characterise such a book” (meaning thereby that the said book was disgusting and obscene): and, in another part of the said libel, to the substance and effect following: “We also applied to several medical booksellers, who all gave it the same character. They described it as one of Stockdale’s obscene books” (meaning thereby that the plaintiff was a common publisher of obscene books); “that it never was considered as a scientific work; that it never was written for or bought by the members of the profession as such; that it was intended to take young men in, by inducing them to give an exorbitant price for an indecent work:” To the great injury of the plaintiff in his said trade and

business, and also of his fair fame and reputation, and to the damage of the plaintiff of 5000*l.*, &c.

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Plea. That, heretofore and before the commencement of this suit, and after the making of a certain Act of Parliament (o), &c., the Right Hon. Lord John Russell, then being one of his late Majesty's principal Secretaries of State, in pursuance of the said Act, nominated and appointed William Crawford, Esq., and the Rev. Whitworth Russell to visit and inspect, either singly or together with any other inspector or inspectors appointed under the provisions of the said Act, every gaol, bridewell, house of correction, penitentiary, or other prison or place kept for the confinement of prisoners in any part of Great Britain; and that afterwards, &c., they, the said William Crawford and Whitworth Russell, as such inspectors, made their report in writing of the state of a certain gaol called Newgate, and transmitted the same to the said Right Hon. Lord John Russell, then being such Secretary of State, in pursuance of the said Act. And that before the publication of the said supposed libel, a parliament of our sovereign lord his late Majesty King William IV. was holden at Westminster; and it was in and by the Commons' House of the said Parliament then resolved and ordered that the parliamentary papers and reports printed for the use of the House should be rendered accessible to the public by purchase at the lowest price at which they could be furnished, and that a sufficient number of extra copies should be printed for that purpose (p); And that afterwards, at a parliament of our late said lord the king, holden at Westminster, before the publication of the said supposed libel in the said declaration mentioned, it was ordered by the said Commons' House of Parliament that a select committee should be appointed to assist Mr. Speaker in all matters which re-

(o) See Stat. 5 & 6 Will. 4, c.

(p) 90 Comm. Journ. 544.

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lated to the printing executed by order of the House (q): And that afterwards, and before the publication of the said supposed libel, a select committee was duly appointed by the said House, in pursuance of the said last-mentioned order, for the purposes in the said order mentioned: And that afterwards, and before the publication of the said supposed libel, and whilst the said last-mentioned parliament was so sitting as aforesaid, it was resolved by the said committee, appointed in pursuance of the said last-mentioned order of the said House, that the parliamentary papers and reports printed by order of the House should be sold to the public at certain specified rates, and that Messrs. Hansard (meaning the defendants), the printers of the House, be appointed to conduct the sale thereof; And that afterwards, and before the said publication of the said supposed libel, and whilst the said last-mentioned parliament was sitting, a copy of the said report was laid before the said Commons' House of Parliament, pursuant to the directions of the said Act of Parliament (r): And that afterwards, and before the publication of the said supposed libel, and whilst the said parliament was so sitting as aforesaid, it was in and by the said Commons' House of Parliament ordered that the said report of the inspectors of prisons should be printed (s): Whereupon the said defendants, then being printers employed for that purpose by the said House, did afterwards, in pursuance of the said orders and resolutions, print and publish the said report: And that afterwards, and during the sitting of the said last-mentioned parliament, and before the publication of the said supposed libel, viz., on 5th July, 1836, it was ordered, by the said Commons' House of Parliament, that there should be laid before that House a copy of a report made, on 2nd July, 1836, by a committee of the Court of Aldermen to that Court, upon the said

(q) 91 Comm. Journ. 16.

(r) *Ib.* 156.

(s) *Ib.* 194.

report of the said inspectors of prisons in relation to the gaol of Newgate (*t*): And that, in pursuance of the said last-mentioned order, the said report made on 2nd July, 1836, was laid before the said Commons' House of Parliament, and was thereupon then ordered by the said Commons' House of Parliament to be printed: and that afterwards, viz., on 22nd July, in the year aforesaid, they, the said W. Crawford and W. Russell, so being such inspectors as aforesaid, transmitted to the said Right Hon. Lord John Russell, then being one of his late Majesty's principal Secretaries of State as aforesaid, a certain reply in writing of them the said W. Crawford and W. Russell, as such inspectors as aforesaid, with regard to the said report of the said Court of Aldermen; and afterwards, and before the publication of the said supposed libel, viz., on 25th July, in the year aforesaid, a copy of the said reply of the said inspectors of prisons for the Home District, with regard to the said report of the said Committee of Aldermen, was, in pursuance of an order of the said Commons' House of Parliament for that purpose made, presented to and laid before the said House (*u*); and thereupon the same then became and was part of the proceedings of the said Commons' House of Parliament: And it was afterwards, and before the publication of the said supposed libel, and during the sitting of the said last-mentioned parliament, viz., on 26th July, in the year last aforesaid, ordered by the said Commons' House of Parliament that the said reply of the said inspectors should be printed (*x*): Whereupon the said defendants, so being printers as aforesaid, and employed for that purpose, did, by the authority of the said Commons' House of Parliament, and in pursuance of the said orders and resolutions of the said House, print the said reply of the said inspectors of prisons, as directed and required by the said orders and resolutions of the said House, and

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(*t*) 91 Comm. Journ. 622.

(*u*) *Ib.* 691.

(*x*) *Ib.* 698.

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did publish the same by the authority of the said House, and as directed and authorized by the said orders and resolutions, and not otherwise, as it was lawful for them to do for the cause aforesaid: And the said defendants further say that the said report and the said reply are the same report and reply as are mentioned in the declaration, and that the publishing as charged in the declaration, is the same publishing, as in this plea mentioned: And that the said Commons' House of Parliament heretofore, viz., on 31st May, in the year last aforesaid (*y*), resolved, declared, and adjudged that the power of publishing such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interests is an essential incident to the constitutional functions of parliament, more especially to the Commons' House of Parliament as the representative portion of it.—The plea concluded with a verification.

Demurrer.

To the foregoing plea the plaintiff demurred, assigning for causes: That the known and established laws of the land cannot be superseded, suspended, or altered by any resolution or order of the House of Commons: That the House of Commons, in parliament assembled, cannot, by any resolution or order of themselves, create any new privilege to themselves, inconsistent with the known laws of the land; and That if such power be assumed by them, there can be no reasonable security for the life, liberty, property, or character of the subjects of this realm.

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After joinder in demurrer and argument (*z*) by Mr. Curwood for the plaintiff:—

It was argued on behalf of the defendants (*a*) to the following effect.

The House of Commons is called before an inferior

(*y*) This is a mistake; the date was May 31, 1837, not 1836. 92 Comm. Journ. 419.

give, as the purport of it may be sufficiently collected from the judgment.

(*a*) By Sir J. Campbell, Att.-Gen.

(*z*) Which it is unnecessary to

tribunal for authorizing a publication which it thought beneficial to the community, and essential to the discharge of its legislative functions. The right to do so is an ancient privilege recognized by legislative declarations, and never questioned, since the Revolution, except by the plaintiff. The assertion of that right is a claim of free intercourse between members of the House and their constituents, advanced solely for the public benefit, and it is, in a peculiar manner, one of those "Rights and Privileges of Parliament" described in the Remonstrance of both Houses to Charles I. (December, 1641) (*b*), as "the birth-right and inheritance, not only of themselves, but of the whole Kingdom."

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The House of Commons has directed the defendant to appear and plead to this action; but it does not thereby submit its privileges to the decision of this Court, or of any other tribunal than itself. The only object of the pleading is to inform the Court, in a regular way, that the act complained of was done in exercise of its authority and in the legitimate use of its privileges. The fact that it was so done is admitted by the demurrer; and nothing remains for this Court but to give judgment for the defendants. Another and a summary remedy might have been adopted; but the House, having confidence in the tribunals of the country, deems it expedient to refer the case to the consideration of the Court in the ordinary course of justice, thereby giving to the plaintiff an opportunity either of denying that the act was done under the alleged authority, or of showing that the authority has been exceeded.

Suppose in an action of trespass the defendant pleaded a commitment by the House for prevarication, or for non-attendance on due summons, or for an assault on a member in the House, or the Speaker in the chair; would it be competent to this Court, upon such a plea, to enquire

(*b*) 2 Parl. Hist. 978.

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whether any privilege to commit existed? Yet, if this demurrer is to prevail, there is no tribunal before which the nicest question of privilege may not be discussed.

The points insisted upon by the defendants, are:—

I. The alleged grievance arises from an act done by the House of Commons, in the exercise of a privilege claimed by them. The question of privilege, therefore, arises directly; and this Court cannot enquire into the existence of the privilege, but must give judgment for the defendants.

II. Even if the question arose incidentally, still, on this record, the Court could not enquire into the existence of the privilege, but must give judgment for the defendants.

III. The privilege (assuming that the Court could enquire into its existence) does exist.

I. As to the first point.

The courts of law are subordinate to the Houses of Parliament; and that shows their incompetency to decide upon a question of parliamentary privilege directly arising. Originally, the Houses of Lords and Commons sat together. The courts of law, which at that time were established and had the same powers which they now enjoy, were clearly subordinate to the parliament. A writ of error lay from them to the parliament, and they were accustomed even to consult parliament before they decided points of difficulty and importance. But, according to the argument now urged, an Act of the whole parliament might at that very time have been reviewed by a court of law. The Houses of Parliament were subsequently divided. If the courts of law could not, before that time, have enquired into the legality of a commitment, or the publication of a paper, by parliament, neither could they do so afterwards.

The inconsistency which results from supposing that a court of common law can review the acts of either House of Parliament may be thus illustrated. The House of

Lords exercises an appellate jurisdiction in cases depending in this and the other Courts of Westminster Hall. Privilege is given to the House of Commons to be exercised against the Crown and the House of Lords : unless the Commons were themselves the tribunal by which their privilege is to be judged, it would have been abolished long ago. The necessity for preserving it from interference by the courts of law is not to be estimated from the present improved state of those courts. The law of privilege was settled when Judges were the creatures of the Crown, and liable to be discarded if not obedient. And at any period in the case of a contest between the two Houses, if a question of privilege arose, and could be decided in a court of common law, the ultimate appeal would be to the House of Lords, who would thus become judges in the last resort of the privileges of the Commons.

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The Commons, have, in particular, the power of enquiring into the conduct of the courts of justice ; and at the commencement of every session a grand committee of justice is appointed by that House, to receive complaints from the various tribunals within the jurisdiction of the House. The House itself is, according to all authorities, a court.

The *lex parliamenti* is not known to the judges of the common law courts. They have no means of arriving judicially at any information on the subject of privilege. The judges, even of the superior courts, are not, in general, and cannot be presumed to have been, members of either House of Parliament. The parliamentary reports, and even the journals, furnish little information on the subject, many privileges resting wholly in usage. It is said that all subjects of the realm are bound to take notice of parliamentary privilege : but that does not imply a judicial knowledge. All persons are bound to take notice of the general law of the land ; but all are not competent to administer it.

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Either the courts of common law must take the law of privilege as laid down by the Houses of Parliament, or the Houses must accept it from them. In the latter case, the decision of a *pie poudre* court may bind the Lord Chancellor and the Speaker. And the judgments of the common law courts may not be uniform. There may be twenty actions against the Speaker for libel or false imprisonment, or as many indictments (for if privilege is no bar to a civil action it is clearly no answer to an indictment), and as many county courts, or courts of quarter session, may be of different opinions as to the law. By what rule, then, is parliament to be guided in its exercise of privilege?

Arguments are likewise drawn from the liability of this privilege to abuse: but such a liability does not show that the privilege has no existence. In every balanced government there must be powers so constituted as to check each other, powers which have their respective limits, but for the abuse of which there can be no remedy. In this country the Crown has, by its prerogative, the powers of declaring peace and war, of pardoning, and of summoning and dissolving parliament; and if these are abused the law furnishes no remedy. So the House of Lords have the power of judicature in the last resort; and for any decision they might give in abuse of that power there is no redress. The House of Commons has the absolute power of voting the public money, and might stop the supplies improperly. An Attorney General may enter a *nolle prosequi* on any prosecution, and might, if he chose to abuse that power, obstruct the course of justice. He may refuse his fiat for a writ of error; or he may make an injurious use of the discretion vested in him as to filing criminal informations. But these powers do not the less exist. The three branches of the legislature have an unlimited power. They might make a statute for abolishing the House of Commons. The Septennial Act was a strong instance of their exercise of

authority. They might pass an Act for changing the religion of the country against the wish of the people. For such cases no redress is provided by the law; if they occur, revolution has begun, and the only remedy is resistance.

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It is also asked what would be the remedy if either House of Parliament were to do something very outrageous, as to issue an injunction against proceeding in an ejectment; or to order the Speaker to execute a person as a criminal. The answer is, that it is not decent to put such cases. It might as well be asked what remedy could be taken if the Sovereign were personally to commit a crime.

In *Pye's Case* (d), it is mentioned, as a proof of the low state to which the parliament had fallen before the Restoration, that when Sir R. Pye, who had been committed by their order, was brought before the Court of King's Bench on *habeas corpus*, and Judge Newdigate asked the Counsel for the Commonwealth why it should not be granted, they answered that they had nothing to say against it; whereupon the Judge, "ashamed to see them so unfaithful to their trust," replied, that "Sir Robert Pye being committed by an order of the parliament, an inferior court could not discharge him."

II. It is a general rule that the judgments of courts of exclusive jurisdiction are conclusive against all the world; and their decisions bind courts in which the questions decided arise incidentally (e). In many instances a court of peculiar jurisdiction has prevented causes which were properly to be decided there from coming before any other tribunal. Courts of exclusive jurisdiction interfere to prevent other courts from acting in matters within

(d) 5 St. Tr. 941; Ludlow, 321, (ed. 1751).

Case, and Note thereto; 2 Smith, L. C. 8th ed. p. 784.

(e) See *The Duchess of Kingston's*

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such jurisdiction. The House of Commons might therefore have prevented this court from proceeding in the present case, had that been considered an expedient course.

In *Biggs's Case* (f), the Lords ordered a person into the custody of the Black Rod, for bringing an action against a justice of the peace who had apprehended him by command of the House for a riot at the door of the House. The attorney was also committed to Newgate; and the plaintiff in the action was not discharged from custody until he had released the defendant. In *Hyde's Case* (g), Mr. Hyde was committed by the Lords for indicting a constable who had assaulted him; the assault having been committed in pursuance of a general order of the House to refuse admission into Westminster Hall during the trial of Warren Hastings.

In *Jay v. Topham* (h) the defendant was sued for false imprisonment; he pleaded to the jurisdiction, that he was serjeant-at-arms to the House of Commons, and had taken the plaintiff by order of the House. The plaintiff demurred to the plea, as being pleaded after full defence, and yet not answering all the declaration; and there was judgment of *respondeat ouster*. After the Revolution, this case was brought before the House of Commons on the defendant's petition (i), and referred to a committee of privileges. The House resolved that the judgment was illegal (k). The two surviving judges, Pemberton and Jones, being brought before the House, defended themselves on the ground that the plea should not have been to the jurisdiction; but they admitted fully that the defence was, if properly pleaded, a valid one. In fact, however, it seems that there was a plea in bar, which was

(f) 32 Lords' Journ. 185, 187.

(i) 10 Comm. Journ. 164.

(g) 38 Lords' Journ. 250, 251.

(k) 10 Comm. Journ. 210; 12 St.

(h) *Burdett v. Abbot*, 14 East, Tr. 821.

102 (a).

over-ruled, as appears from Topham's petition (*l*). The two judges, therefore, had knowingly violated the law, to gratify the Court party, and were not treated with undeserved severity by the Commons (*m*). The record is not in the Treasury; it was taken up to the House of Commons on the occasion of the petition, and probably not returned. *Verdon v. Topham* (*n*) was an action of the same kind against the same party: there was a plea to the jurisdiction, and judgment of *respondeat ouster*; but little else appears.

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III. Assuming that this Court were competent to enquire into the existence of the privilege, it may be shown that the power of printing and publishing reports and papers, though of a criminatory nature, for public information and benefit, has long existed. If the House has power to order the publication, it must follow as a necessary consequence that no action will lie: for criminatory matter published by lawful authority cannot be a libel. The fact of sale for money can be no material ingredient in the offence; nor does it appear by the plea that the paper in question was sold (*o*).

It is conceded that a publication confined to the use of members is lawful; yet the evil now complained of must result to the party inculpated, in an equal or greater degree from this limited circulation. It is presumed that every member of the upper as well as the lower House may read it. If the language is not actionable *per se* as verbal slander, he may repeat it to others. The slander may thus obtain general publicity; yet not a copy can be sold, or shown to the party injured; and he is thus deprived of all means of vindicating his character.

Among the objections which have been urged to this claim of privilege are,

(*l*) 10 Comm. Journ. 164.

(*m*) *Vide per* Lord Denman, *post*,
p. 915.

(*n*) Sir T. Jones, 208.

(*o*) It did not appear on the record
that the *selling* was either com-
plained of or confessed.

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1. That it alters the law of the land, by legitimating the sale of libels. This is a *petitio principii*: it assumes that the privilege is not the law of the land.

2. That the exercise of the right inflicts a wrong, and that there is no wrong without a remedy. This again is begging the question. It is not a wrong if lawfully done; and as to the loss or inconvenience to the party, the law, in pursuit of a greater benefit, does not regard it.

3. It is objected, that this privilege is not among those claimed by the House from the king at the beginning of every parliament. The answer is that the privileges are inherent in the House, and as ancient as the prerogative of the Crown. The demand is a mere form, like the consent of the people asked for the sovereign at the coronation. They were never prayed for by the Speaker until the reign of Henry IV.; and, when James I. asserted that they were enjoyed of mere grace and favour, the Commons entered a protest on their journals, which was torn out by the king (*p*).

4. Again, it is objected that the immunity claimed is unnecessary, and that the proceedings would be sufficiently circulated through the same medium as the debates. But there is a distinction between papers and debates. The former are published at discretion, and by the order of the House. The debates are published without authority, the House retaining its power of conducting them in secrecy for the purpose of protecting itself from the interposition of the Crown.

5. It is said that all useful matter may be published without any libel. But the publication of some reports

(*p*) 1 Com. Journ. 668. 1 Hats. 77—80. And see the authorities cited in *Holiday v. Pitt*, 2 Stra. 985. In 1621, the House of Commons having entered upon their journals a protestation "that the liberties, franchises, privileges, and

jurisdictions of parliament are the ancient and undoubted birthright and inheritance of the subjects of England," James I. sent for the journals, and, in council, erased the protestation. See 1 Parl. Hist. pp. 1361—3.

would be impossible if everything offensive to the feelings were to be expunged.

6. It is objected that this privilege cannot exist by prescription, being one that must have arisen within time of memory. This argument would deprive the House of all privileges; for its separate existence, as a branch of the legislature, can hardly be traced beyond legal memory.

7. As to the argument from abuse, all power is capable of being abused (*q*). The unquestioned right of commitment for contempt may be so. The privilege of freedom from arrest may be made a shelter for fraudulent debtors. Freedom of speech may be used as a licence to calumniate. But the constitution presumes that the Houses of parliament, as well as the courts of justice, will usurp no undue authority. That the power has been exercised with moderation may be inferred from the fact that no action has been attempted since the Revolution, until that lately brought by the plaintiff himself (*r*); at least this inference cannot be denied by those who assert that such publication has always been actionable.

No instance can be found in which a publication by authority of either House of Parliament has been considered a subject of prosecution or civil action (*s*).

The only remaining authority is the *dictum* of Lord Denman, C.J., in the former case of *Stockdale v. Hansard* (*t*). In that action of libel, it was urged for the defendants at *Nisi Prius* that the matter complained of was privileged, being contained in a report published by order of the House of Commons. His lordship held that the order was no protection; but the question was not fully discussed; and, as the defendants had a verdict on the plea of justification, there was no further occasion to

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(*q*) *Ante*, p. 884.

(*r*) 2 M. & Rob. 9.

(*s*) *R. v. Lord Abingdon*, 1 Esp. 226, and *R. v. Creevey*, 1 M. & S. 273, were here cited and distinguished.

(*t*) 2 M. & Rob. 9. S. C. in the Report of the Select Committee on publication of printed papers, 8th May, 1837. Appendix to Minutes of Evidence, No. 1, p. 65.

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contest the point. But, as it now appears, the great body of authorities is adverse to his lordship's ruling.

Since the trial of that cause, the question of privilege, as applied to the point now before the Court, has been referred to a committee of the House of Commons, appointed without reference to party; they have reported, with only one dissentient voice, in favour of the protection claimed by these defendants; and their report has been adopted by the House of Commons. An opinion so delivered and adopted is entitled to weight in a Court of law. And the Court will remember the advice of Lord Bacon, to a judge of the Court of Common Pleas, on his appointment: "That you contain the jurisdiction of the Court within the ancient mere-stones, without removing the mark" (u); and the *dictum* of Abbott, C.J., in *Ex parte Cowan* (x): "We wish not to be understood as giving any sanction to the supposed authority of this Court to direct a prohibition to the Lord Chancellor sitting in bankruptcy." "If ever the question shall arise, the Court, whose assistance may be invoked to correct an excess of jurisdiction in another, will, without doubt, take care not to exceed its own."

Mr. Curwood replied, and after time taken to consider, the learned judges, in Trinity term, 1839, delivered judgment *seriatim* as follows:—

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Lord Denman, C.J. This was an action for a publication defaming the plaintiff's character, by imputing that he had published an obscene libel.

The plea was, that the inspectors of prisons made a report to the secretary of state, in which improper books were said to be permitted in the prison of Newgate; that the Court of Aldermen wrote an answer to that part of the report, and the inspectors replied repeating the statements, and adding that the improper books were published by the plaintiff. That all these documents were

(u) Lord Bacon's Works, ed. 1803, vol. iv. p. 508.

(x) 3 B. & A. 130.

printed by and under orders from the House of Commons, who had come to a resolution to publish and sell all the papers they should print for the use of the members, and who also resolved, declared, and adjudged, that the power of publishing such of their reports, votes, and proceedings as they thought conducive to the public interest, is an essential incident to the due performance of the functions of parliament, more especially to those of the Commons' House (y).

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The plea, it is contended, establishes a good defence to the action on various grounds.

1. The grievance complained of appears to be an act done by order of the House of Commons, a court superior to any court of law, and none of whose proceedings are to be questioned in any way.

This principle the learned counsel for the defendant repeatedly avowed in his long and laboured argument; but it does not appear to be put forward in its simple terms in the report that was published by a former House of Commons.

It is a claim for an arbitrary power to authorize the commission of any act whatever, on behalf of a body which in the same argument is admitted not to be the supreme power in the state.

The supremacy of parliament, the foundation on which the claim is made to rest, appears to me completely to overturn it, because the House of Commons is not the parliament, but only a co-ordinate and component part of the parliament. That sovereign power can make and unmake the laws; but the concurrence of the three legislative estates is necessary; the resolution of any one of them cannot alter the law, or place any one beyond its control. The proposition is therefore wholly untenable, and abhorrent to the first principles of the constitution of England.

2. The next defence involved in this plea is, that the

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defendant committed the grievance by order of the House of Commons in a case of privilege, and that each House of Parliament is the sole judge of its own privileges. This last proposition requires to be first considered. For if the Attorney General was right in contending, as he did more than once in express terms, that the House of Commons, by claiming anything as its privilege, thereby makes it a matter of privilege, and also that its own decision upon its own claim is binding and conclusive, then plainly this Court cannot proceed in any enquiry into the matter, and has nothing else to do but declare the claim well founded because it has been made.

This is the form in which I understand the committee of a late House of Commons to have asserted the privileges of both Houses of Parliament: and we are informed that a large majority of that House adopted the assertion. It is not without the utmost respect and deference that I proceed to examine what has been promulgated by such high authority: most willingly would I decline to enter upon an enquiry which may lead to my differing from that great and powerful assembly. But, when one of my fellow subjects presents himself before me in this Court, demanding justice for an injury, it is not at my option to grant or withhold redress; I am bound to afford it if the law declares him entitled to it. I must then ascertain how the law stands; and, whatever defence may be made for the wrongdoer, I must examine its validity. The learned counsel for the defendant contends for his legal right to be protected against all consequences of acting under an order issued by the House of Commons, in conformity with what that House asserts to be its privilege: nor can I avoid then the question whether the defendant possessed that legal right or not.

Parliament is said to be supreme; I most fully acknowledge its supremacy. It follows, then, as before observed, that neither branch of it is supreme when acting by itself. It is also said that the privilege of each house is the

privilege of the whole parliament. In one sense I agree to this; because whatever impedes the proper action of either impedes those functions which are necessary for the performance of their joint duties. All the essential parts of a machine must be in order before it can work at all. But it by no means follows that the opinion that either house may entertain of the extent of its own privileges is correct, or its declaration of them binding.

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In the course of the argument, the privileges of the Commons were said to belong to them for their protection against encroachment by the Lords. The fact of an attempt at encroachment may, then, be imagined; and we must also suppose that the Commons would resist it. In such a case, the claim set up by the two houses being inconsistent, both could not be well founded, and an instance would occur of adverse opinions and declarations, while the real privilege, whenever it is ascertained, would certainly be the inherent right of parliament itself.

The argument here became historical, and we were told that, at the early period when privilege was settled, the three estates, assembled, and embracing all the power of the state, never would have left their privileges at the mercy of a very inferior tribunal, especially when the King's Judges were dependent on the Crown, and removable at its pleasure. I cannot accede to the inference. If in those early times the Lords and Commons had felt the enlightened jealousy of dependent judges which is here supposed, they would not have left them in that state of dependence, equally dangerous to the character of the judges and to the just rights of themselves and of all their constituents. But we have no proof whatever of the constitution of this country being framed on abstract principles: there cannot be a doubt that it adapted itself to the exigencies of the several occasions that arose, and gradually grew into that form which the ends of good government require. But, while I dispute the fact of privileges being settled in the *aula regia*, or any other

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supposed constituent assembly, on any given principle, or indeed at all, I am far from believing that the Judges ever had, or ought to have, by law, the smallest power over parliament or either house of parliament. The independence of parliament is the corner stone of our free constitution. The judges who invaded it in the reign of James I. and his son, have justly shared with those who betrayed the rights of the people in the case of ship-money, the abhorrence of all enlightened men. But a mean submissiveness to power has not been always confined to the judges; the same dispositions belonged to parliament itself, and to both houses. When we remember the sentence pronounced against an unfortunate gentleman of the name of Floyde (z), for a slight offence, if it were one, against King James I., in speaking of his daughter and son-in-law, we shall allow that the two houses had as little sense of independence as of justice. The Commons resolved, declared, and adjudged that his fortune should be confiscated, and his body tortured, his name degraded, and himself imprisoned for life. The Lords rebuked the invasion of their privileges of punishing, for which the Commons humbly apologised; but the sentence was carried into full effect: and can any one believe that these two houses, thus vying in obsequiousness and cruelty, could entertain good views on the constitutional independence of parliament? (a).

Another reason for denying to the courts of law all power in matters of privilege was said to flow from their same supposed ancient jealousy of the Lords. "The Commons never would have tolerated such an enquiry, because the decision might then have come to be reviewed on appeal by the co-ordinate and rival assembly" (b); yet the Attorney General informed us, almost in the same breath, that the appellate jurisdiction of the Lords

(z) 2 St. Tr. 1153.

1250; 8 St. Tr. 92 *et seq.*

(a) See the debates, 1 Parl. Hist.

(b) *Ante*, p. 883.

was of recent date, that it originally belonged to the whole parliament, and that it was long warmly contested with adverse declarations of privilege by the House of Commons. *Burdett v. Abbot* (c) was an action brought against the Speaker himself, for an act done by him in parliament by order of the House of Commons. The plaintiff questioned his right, and, by seeking redress in this court, eventually submitted their privilege to the decision of the House of Lords. At this very moment the defendant, as acting by order of the House of Commons, prays our judgment in this question of privilege, and the House of Commons instructs the Attorney General to appear as his counsel before us. He tells us, indeed, that we can only decide in his favour; but, if we do, the House of Lords may reverse that judgment next week. Such is the practice of the nineteenth century: yet we are gravely told that in the dark ages of our history the Commons were too enlightened to allow any discussion of their privileges in any court whose judgment may be questioned in the Lords.

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But it is said that the courts of law must be excluded from all interference with transactions in which the name of privilege has been mentioned, because they have no means of informing themselves what these privileges are. They are well known, it seems, to the two houses, and to every member of them, as long as he continues a member; but the knowledge is as incommunicable as the privileges to all beyond that pale. It might be presumption to ask how this knowledge may be obtained, had not the Attorney General read to us all he had to urge on the subject from works accessible to all, and familiar to every man of education. The argument here seems to run in a circle. The courts cannot be entrusted with any matter connected with privilege, because they know nothing about privilege; and this ignorance must be perpetual,

(c) 14 East, 1.

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because the law has taken such matters out of their cognizance. The old text writers, indeed, affirm the law and custom of parliament, although a part of the *lex terræ* to be *ab omnibus quæsitæ à multis ignorata*. This and other phrases, repeated in the law books, have thrown a kind of mystery over the subject, which has kept aloof the application of reason and common sense. Lord Holt (*d*) in terms denied this presumption of ignorance, and asserted the right and duty of the courts to know the law of parliament, because the law of the land on which they are bound to decide. Other judges, without directly asserting the proposition, have constantly acted upon it; and it was distinctly admitted by the Attorney General in the course of his argument. I do not know to whom he alluded as disputing the existence of any parliamentary privilege; no such opinion has come under my notice. That parliament enjoys privileges of the most important character, no person capable of the least reflection can doubt for a moment. Some are common to both houses, some peculiar to each; all are essential to the discharge of their functions. If they were not the fruit of deliberation *in aulâ regiâ*, they rest on the stronger ground of a necessity which became apparent at least as soon as the two houses took their present position in the state.

Thus the privilege of having their debates unquestioned though denied when the members began to speak their minds freely in the time of Queen Elizabeth, and punished in its exercise both by that princess and her two successors, was soon clearly perceived to be indispensable and universally acknowledged (*e*). By consequence, whatever is done within the walls of either assembly must pass without question in any other place. For speeches made in parliament by a member to the prejudice of any other

(*d*) See *Reg. v. Paty*, 2 Lord Raym. 1114, 1115; Judgment of Lord Holt in that case, ed. 1837, p. 54; *Ashby*

v. *White*, 2 Lord Raym. 956.

(*e*) *Ante*, p. 518, n. (*d*).

person, or hazardous to the public peace, that member enjoys complete impunity. For any paper signed by the Speaker by order of the house, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the Speaker cannot be arraigned in a court of justice. But, if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher. So, if the Speaker, by authority of the house, order an illegal act, though that authority shall exempt him from question, his order shall no more justify the person who executed it than King Charles's warrant for levying ship-money could justify his revenue officer.

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The privilege of committing for contempt is inherent in every deliberative body invested with authority by the constitution. But, however flagrant the contempt, the House of Commons can only commit till the close of the existing session. Their privilege to commit is not better known than this limitation of it. Though the party should deserve the severest penalties, yet, his offence being committed the day before a prorogation, if the house ordered his imprisonment but for a week, every court in Westminster Hall and every judge of all the courts would be bound to discharge him by *habeas corpus*.

Nothing is more undoubted than the exclusive privilege of the people's representatives in respect to grants of money, and the imposition of taxes. But, if their care of a branch of it should induce a vote that their messenger should forcibly enter and inspect the cellars of all residents in London possessing more than a certain income, and if some citizen should bring an action of trespass, has any lawyer yet said that the Speaker's warrant would justify the breaking and entering?

The Commons of England are not invested with more of power and dignity by their legislative character than by that which they bear as the grand inquest of the

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nation. All the privileges that can be required for the energetic discharge of the duties inherent in that high trust are conceded without a murmur or a doubt. We freely admit them in all their extent and variety; but, if, on a resolution of guilt voted by themselves, this grand inquest should not accuse but condemn, should mistake their right of initiating a charge for the privilege of passing sentence and awarding execution, will it be denied that their agent would incur the guilt of murder?

I will speak but of one other privilege, the privilege from personal arrest, which is both undoubted and indispensable. A distinction has been sometimes taken, but, in my opinion, does not exist in law, between one class of privileges as necessary for performing the functions of parliament, and another as a personal boon; both classes are, as I apprehend, conferred on grounds of public policy alone. The proceedings of parliament would be liable to continual interruption at the pleasure of individuals, if every one who claimed to be a creditor could restrain the liberty of the members. In early times their very horses and servants might require protection from seizure under legal process, as necessary to secure their own attendance; but, when this privilege was strained to the intolerable length of preventing the service of legal process, or the progress of a cause once commenced against any member during the sitting of parliament, or of threatening any who should commit the smallest trespass upon a member's land, though in assertion of a clear right, as breakers of the privileges of parliament, these monstrous abuses might have called for the interference of the law, and compelled the courts of justice to take a part. Suppose, then, in the celebrated case of Admiral Griffin (*f*), that one who claimed a right of fishing in his

(*f*) In this case four persons were committed for contempt, their offence having been fishing in a pond belong-

ing to Admiral Griffin, who was a member of the house. 28 Com. Journ. 489, 545.

ponds had brought an action here against the officer who seized him, who justified the imprisonment under the Speaker's warrant, alleging his high contempt in daring to fish in a member's pond near Plymouth; would not the Court of Queen's Bench have been bound to enquire as to the privilege, and to declare that it did not and could not extend to such a case? I desire to put the further question, whether the decision of such cases could be at all varied by the house declaring, with whatever of solemnity or menace, that it was the ancient and undoubted privilege of parliament to do each and every one of the abusive acts enumerated.

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Examples might be multiplied without limit; but the examples are said to be abuses, and to prove nothing against the use. It is also urged that abuse is not to be presumed; that the only appeal lies to public opinion, and that outrages like these would authorise resistance and amount to a dissolution of the government. I answer, that cases of abuse must be supposed, to test the truth of the principle now under discussion. I say, farther, that it is only in cases of abuse that the principle is required; that, though the maxim be true, *ab abusu ad usum non valet consequentia*, it cannot apply where an abuse is directly charged and offered to be proved; that no presumption can be made against a fact established or admitted. Need I go on to add, that the appeal to public opinion, however successful, comes too late after the injury has been effected, and that to talk to an innocent sufferer of his right to consider the social compact as broken towards him, to throw off his allegiance, and resist the outrage perpetrated in the name of parliament, is language at least novel in a court of law?

We were, however, pressed with numerous authorities, which were supposed to establish that questions of privilege are in no case examinable at law. *Thorpe's*

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Case (g) was, as usual, first cited. The facts were, that the lords, in Edward IV.'s time, consulted the judges respecting the privilege then claimed by a member of the Commons' House, and the judges at first declined to answer—facts totally inconsistent with an anterior settlement of parliamentary privilege, especially on the footing of the jealousy felt by the Commons towards the Lords and the judicial authorities. The judges did ultimately waive their objection to declaring an opinion on a question of privilege; they declared it in parliament, and by parliament it was adopted (*h*). Yet their reluctance to assume, in the first instance, the delicate office of interfering with the privilege of parliament, even at the request of the House of Lords, and the respectful and submissive language in which they, the interpreters of the law, avowed their deference to those who make it, have been construed into a judicial decision that in their own courts they would decline to enforce that very law when made, if either House of Parliament should obstruct and overbear it by setting up the most preposterous claim under the name of privilege. Often, undoubtedly, similar expressions have fallen from the judges; but they must be modified by the cases in which they occurred. A sentence from C. J. North's judgment in *Barnardiston v. Soame* (*i*) was read at the bar. The question being, whether an action on the case lay against the sheriff at common law for a double return of members to parliament, which he strongly denied, he said, in the course of his elaborate argument, "If we shall allow general remedies (as an action upon the case is) to be applied to cases relating to the parliament, we shall at last invade privilege of parliament, and that great privilege of judging of their own privileges." These words appear, at first sight, of extensive import

(*g*) 1 Hats. Pr. 28; 5 Rot. Parl. 239; S. C., 13 Rep. 64. See 4 Inst. 15; 14 East, 25.

(*h*) But see 1 Hats. Pr. 31, 33, 34;

Ferrers' Case, *Id.* 53; *Anon.*, *Id.* 58; Moore, 57.

(*i*) *Ante*, p. 827.

indeed; but when we refer them to the subject then in hand, which was an action against a sheriff for his conduct in a parliamentary election, we shall perceive that they are far from making the large concession supposed. The right of determining the election of their own members is one of the peculiar privileges of the assembled Commons, like all other proceedings for their own internal regulation. With respect to them, I freely admit that the courts have no right to interfere, nor, perhaps, any regular means of obtaining information. How they must deal with such points when actually brought before them, is another consideration. But the possible inconvenience that might arise from permitting the action against the sheriff, if the courts should come into conflict with parliament in those points of unquestionable privilege in which parliament must have the sole power of declaring what its privilege is, furnishes no shadow of an argument for the proposition, that whatever subject either House declares matter of privilege instantly becomes such to the exclusion of all enquiry by the courts.

We were also reminded of the disparaging terms applied by the judges to their own authority, when Alexander Murray, in 1751, was brought before this court by *habeas corpus* (*k*). I have obtained a copy of the return, setting out a commitment by the House of Commons for a contempt in general terms: but it is not unworthy of remark, that Foster, J., founds his judgment on what was said by Lord Holt, and treats it as a commitment for a contempt in the face of the House. The fact was so, but the return did not state it; and Lord Ellenborough observed, in *Burdett v. Abbot* (*l*), that Holt did not so limit the power of commitment for contempts. Twenty years later, Brass Crosby, Lord Mayor of London, brought himself before the Court of Common Pleas by *habeas corpus* (*m*).

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(*k*) 1 Wils. 299.

(*l*) 14 East, 111, 148.

(*m*) 3 Wils. 188; S. C., 2 W. Bl.
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The lieutenant of the Tower returned, for the cause of his imprisonment, an adjudication by the House of Commons, that the Lord Mayor, being a member of the House, having signed a warrant for the commitment of a messenger of the House for having executed a warrant of the Speaker, issued by order of the House, was guilty of a breach of privilege of the House. The Lord Mayor had manifestly committed a breach of privilege; the grounds of it are fully set out in the Speaker's warrant; nothing could, therefore, be less needful or less judicial than the wide assertion of privilege that was volunteered by the Chief Justice. Yet, after all that he said respecting the indefinite powers of parliament, his decision rests on the simple ground that all courts have power to commit for contempt. Sir W. Blackstone clearly shewed, on the same occasion, that the return was good on acknowledged principles of law, and declared the power then exercised to be one which the House of Commons only possesses in common with the courts of Westminster Hall. But it must be confessed that his remarks on the state of public feeling rather evince the spirit of a political partisan than the calmness and independence which become the judicial seat. We know now, as a matter of history, that the House of Commons was at that time engaged, in unison with the Crown, in assailing the just rights of the people. Yet that learned judge proclaimed his unqualified resolution to uphold the House of Commons, even though it should have abused its power; rebuked the murmur and complaint which its proceedings had justly excited; deprecated as the last of misfortunes, and in terms which might lead to a supposition that he was at liberty to withdraw from it, a contest between the courts of justice and either House of Parliament, and, with reference to objections pressed against the mode of executing the warrant, worked himself up at length to the untenable position: "It is our duty to presume the orders

of that House, and their execution, are according to law" (n). STOCKDALE
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The two cases last alluded to were disposed of by the courts, without taking time to consider, and even without hearing counsel on one side. In the former, Lee, C. J., took no part, having been absent when Alexander Murray was brought here. I do not mean to insinuate that a longer consideration would have been likely to produce a different result, being satisfied that the decision itself was right. But I do believe that, if the court had deliberated and paused, they would have employed more cautious language, and abstained from laying down premises so much wider than their conclusion required. Lord Ellenborough (o), when pressed with their authority, distinctly refused to bow to it, corrected some phrases ascribed to several judges in the reports of both cases, and placed a limitation on the doctrine laid down by De Grey, C. J., without which it would have yielded to either House of Parliament the same arbitrary power over men's liberty that the doctrine of ship-money would have lodged in the Crown over their property. Judgment
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Lord Kenyon was cited as holding language of the same self-denying import in *R. v. Wright* (p), where Mr. Horne Tooke had applied for a criminal information against a bookseller, for publishing a copy of the report made by a committee of the House of Commons, which was supposed to convey a charge of high treason against Mr. Tooke, after he had been tried for that crime and acquitted. This application for leave to set the extraordinary power of the Court in motion for the punishment of misdemeanors is at all times received with the utmost caution: the Court, in exercising its discretion, often refuses the indulgence prayed. Lawrence, J., thought that the party was not libelled. "It is said,

(n) 3 Wils. 205.

(p) 8 T. R. 293.

(o) 14 East, 111, 113.

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that this report charges him with being guilty of high treason, notwithstanding the verdict of a jury had ascertained his innocence; but that is not the fair import of the paragraph." This opinion, for which the learned judge gives his reasons, was alone sufficient to discharge the rule. But he proceeded to make other observations. He likened the publication of this report to that of a proceeding in a court of justice, and said he was not aware of that having been deemed a libel. To what degree such publications are justifiable, is still a question open to some doubt; there can be none, that, without direct personal malice, it could not properly expose the publisher to a criminal information. Lawrence, J., remarked accordingly, "The proceedings of courts of justice are daily published, some of which highly reflect upon individuals; but I do not know that an information was ever granted against the publishers of them." He then remarks, with much good sense and liberality, that it is also greatly for the public benefit that the proceedings in parliament should be generally circulated; and though he adds, "they would be deprived of that advantage if no person could publish their proceedings without being punished as a libeller," still he speaks with reference to the case before him, giving his reasons for concurring in the discharge of the rule for a criminal information, but not affecting to decide a legal question which did not arise.

Grose, J., laid down no legal proposition in the judgment delivered by him. Lord Kenyon certainly did: as certainly it was extra-judicial, and is open to investigation. The proposition asserted by him was, that no proceeding of either House of Parliament could be a libel. But, with the highest reverence for that most learned judge, I must be allowed to observe that he here confounds the nature of the composition with the occasion of publishing it. Matter defamatory and calumnious, which would therefore found legal proceedings for a libel,

may be innocently published by one who has legal authority to do so. His lordship says, "This is a proceeding by one branch of the legislature, and *therefore*, we cannot enquire into it." If this be true, one branch of the legislature has power to overrule the law. Lord Kenyon felt this, and denied the existence of such a power, adding, "I do not say that cases may not be put, in which we would enquire whether or not the House of Commons were justified in any particular measure." We cannot fail to see that the one sentence is in direct contradiction to the other. The latter puts an end to the claim to authorise any act without the agents being subjected to any enquiry. It equally overthrows that doctrine of the subordination of courts, which would condemn the first criminal tribunal of England to silence and submission if either House should unhappily be induced to give their warrant to a crime.

Lord Kenyon supposes a case, in which the Court would "undoubtedly" pay no attention "to an injunction from the House of Commons;" and he seems to think the case too enormous to have been ever possible. "If, for instance, they were to send their serjeant-at-arms to arrest a counsel here who was arguing a case between two individuals, or to grant an injunction to stay the proceedings here in a common action." Yet these enormities, too gross to be thought possible, were the daily proceedings of the House of Commons in former times; nay, they fall short of the truth. Not only did that great assembly in Charles II.'s time placard Westminster Hall with injunctions to barristers (some of Lord Kenyon's most illustrious predecessors) against daring to appear in the discharge of their duty to their clients, but they sent their serjeant-at-arms to arrest and imprison counsel, solicitors, and parties who had violated their privileges by presuming to appear at the bar of the highest court of appeal in the country. They may not have granted their formal injunction to stay proceedings in a common action; but they constantly

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decided the subjects of common actions as matters of privilege, solely because one of the parties interested happened to be one of their own body. If Lord Kenyon had been chief justice in the days of Sir John Fagg and Dr. Shirley (*q*), and either of them had sued out his writ of *habeas corpus* before him, and had appeared to be in Newgate for the offence of submitting his case to be argued in the House of Lords, it is plain that he would have enquired whether the House was justified in that particular measure, and would have restored the prisoners to freedom. Yet their resolution was "a proceeding by one branch of the legislature," "a proceeding of those who, by the constitution," were "the guardians of the liberties of the subject." This inconsistency in a person of Lord Kenyon's wonderful acuteness, as well as other inaccuracies hereafter to be noticed, make one regret that the judgment in this case, like the judgments of those before whom Murray and Crosby had been brought, was not more deliberately prepared. It was given on the instant, not in a full court, not after hearing both sides. It bears marks of haste, and, we cannot deny, of the excitement and inflammation which belonged to the extraordinary times in which it occurred.

I do not pretend to discuss at length the particulars of every case in which the doctrine of privilege is asserted; but two, of paramount magnitude and importance, cannot be passed over. Sir W. Williams was prosecuted (*r*) by *ex officio* information for an order signed by him as Speaker, authorising the publication and sale of Dangerfield's Narrative, being a slanderous libel on James, Duke of York, four years after that order had been given. His trial did not come on till the duke had ascended the throne; he pleaded to the jurisdiction of the Court, and that plea is admitted to have been properly overruled; he then pleaded as a justification the order of the House of

(*q*) 6 St. Tr. 1121.

(*r*) 13 St. Tr. 1369.

Commons, and that plea was set aside without argument. He was fined 10,000*l.*, and afterwards the fine was reduced to 8000*l.* He never questioned this sentence, nor has it been reversed by any court or by Act of Parliament; on the contrary, Lord Kenyon, in the case last under discussion, appears to me to have considered it as good law; but, at the moment, his memory, in general so faithful, misled him as to the facts. He said, "the publication was the paper of a private individual, and under pretence of the sanction of the House of Commons an individual published" (s). Now, though the narrative was indeed the paper of a private individual, it was adopted by the House, who ordered its publication; the Speaker did not publish as an individual, nor under pretence of their sanction, but as Speaker, and by their direct command. It was, therefore, an act done in parliament. The proceeding was by consequence a breach of the fundamental privilege which exempts all that is there done from question. The affair was taken up by the Convention parliament; the Bill of Rights refers to it: the judgment would probably have been reversed by parliament, like the attainders of Russell and Sidney, if the bill introduced for that purpose had not contained a most iniquitous provision for reimbursing the sufferer out of the estates of the Attorney General, which caused its rejection by the Lords.

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Even if this case were not bad law, it would be worthy of the severest censure; a prosecution by the Crown of a single member of parliament for the misdeed of all; commenced years after; the defence indecently scouted from the court without a hearing; and the conviction followed by an excessive penalty. But in what respect can it be said to bear the least analogy to the present case? The Speaker is not here sued: the sale of the present libel is not by the Speaker: nor took place within the walls of parliament. If any officer of the House had been held

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innocent in disseminating that mass of atrocious falsehood, if any bookseller had been held justified in selling it, because the Speaker ordered that it should be sold for the benefit of the libeller, that would have been indeed a case in point. But I find (*t*) that Dangerfield himself had been convicted and punished for this same publication; and of that sentence I do not find that the legality any more than the justice has ever been challenged; yet it is plain that the Speaker's order under the authority of the House would have been as good a justification to him for publishing, as the resolution of the House can now be to the present defendant. These two cases afford the true distinction; *R. v. Williams* (*u*) was ill decided, because he was questioned for what he did by order of the House, within the walls of parliament. *R. v. Dangerfield* (*x*) is undoubted law, because he sold and published, beyond the walls of parliament, under an order to do what was unlawful.

Lord Shaftesbury, in 29 Car. II. (*y*), sought his discharge from imprisonment in the Tower on an order of the Lords Spiritual and Temporal to keep him and two other lords in safe custody, "during his majesty's pleasure, and the pleasure of this House, for high contempts committed against this House." The return was open to serious objection, as may be seen in the long arguments reported (*z*). Of the three judges who remanded the earl, one said that the return, made by an ordinary court of justice, would have been ill and uncertain, but would not say what would be the consequence as to that imprisonment if the session were determined. The second said, "The return, no doubt, is illegal, but the question is upon a point of jurisdiction, whether it may be examined here? This Court cannot intermeddle with the transactions of

(*t*) *R. v. Dangerfield*, 3 Mod. 68.

(*y*) 6 St. Tr. 1269.

(*u*) 13 St. Tr. 1369.

(*z*) 1 Mod. 144.

(*x*) 3 Mod. 68.

the high Court of peers in parliament, during the session," "therefore the certainty or uncertainty of the return is not material, for it is not examinable here; but if the session had been determined, I should be of opinion that he ought to be discharged." And the third, the chief justice, thought the Court had no jurisdiction, for reasons unconnected with the continuance of the session. It is strange that the duration of the session, on which the judgments turn so much, is now held to be immaterial where the Lords commit. This decision, which undeniably, and *à fortiori*, would give a sanction to many later ones, and many *dicta* touching privilege which arose on *habeas corpus*, is cited by Lord Ellenborough, in *Burdett v. Abbot* (a), without a comment. In *R. v. Flower* (b) allusion is made to it by Lord Kenyon, without considering its authority in point of law. Mr. Justice Holroyd, when arguing *Burdett's Case* at the bar (c), distinguished between that action, in which the nature of the contempt appeared in the plea, and the return to the *habeas corpus* stating the contempt in general terms; he distinguished also between an action and the proceedings by *habeas corpus*.

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One feature of *Shaftesbury's Case* (d) is curious, though not perfectly singular: the very proceedings of the House of Lords, to which the Court of King's Bench yielded entire acquiescence, were condemned by the same House, 19th November, 1680, as "contrary to the freedom of parliament," "derogatory to the authority of parliament, and of evil example and precedent to posterity" (e). The order and proceedings were thereupon adjudged "unparliamentary from the beginning, and in the whole progress thereof, and therefore were all ordered to be vacated, that the same or any of them may never be drawn into

(a) 14 East, 147.

(b) 8 T. R. 314.

(c) 14 East, 62—70.

(d) 6 St. Tr. 1269.

(e) 6 St. Tr. 1310.

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precedent for the future." In the same manner, after Lord Camden and the Court of Common Pleas had held Mr. Wilkes entitled to his release from custody before his trial on an indictment for libel, by reason of his privilege as a member of parliament (*f*), the House of Commons came to a vote that they themselves possessed no such privilege (*g*). By which authority in such cases should we be bound? By that of our own law books, our daily guides, which, however, would appear to refer us to the journals, or by that of the journals of the House, in which the *Lex et Consuetudo Parliamenti* are treasured, but which are supposed to be hidden from our view. I think the Attorney General referred us to the latter, of which he had before assured us that we were ignorant. Yet in *Shaftesbury's Case* (*h*) these journals would overturn the authority of the Court. So, in the Middlesex election contests between Wilkes and Luttrell, it is notorious that the law of parliament was laid down in the most opposite sense on different occasions by the House of Commons.

But, as to these proceedings by *habeas corpus*, it may be enough to say that the present is not of that class, and that, when any such may come before us, we will deal with it as in our judgment the law may appear to require.

The Attorney General told us of another case in point in his favour, *Burdett v. Abbot* (*i*). We must then examine that case fully. The plaintiff committed a breach of privilege by the publication of a libel; the defendant, the Speaker, stating that fact on the face of his warrant, committed him by order of the House to prison; an action was brought for this assault and false imprisonment. Did the House of Commons threaten the plaintiff or his attorney or counsel for a contempt of

(*f*) 19 St. Tr. 989.
 (*g*) 15 Parl. Hist. 1362.

(*h*) 6 St. Tr. 1269.
 (*i*) 14 East, 1.

their privileges? On the contrary, by an express vote they directed their highest officer to plead and submit himself to the jurisdiction of this court. When the suit was pending, did they entertain questions on the course of the proceedings, or resolve that they alone could define their own privileges, or declare that judges who should presume to form an opinion at variance with theirs should be amenable to their displeasure? They suffered the cause to make the usual progress through its stages, and placed their arguments before the court. Their arguments were just; their conduct had been lawful in every respect. The court gave judgment in the Speaker's favour. The grounds of the decision were, not that all acts done by their authority were beyond the reach of enquiry, or that all which they called privilege was privilege, and sacred from the intrusion of law, but that they had acted in exercise of a known and needful privilege, in strict conformity with the law.

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Let us now see what was acknowledged by the court to be the privilege of the House of Commons. Lord Ellenborough, almost on opening his luminous commentary on all the learning so profusely poured out in the discussion, claims for the High Court of Parliament, and each of the Houses of which it consists, "that authority of punishing summarily for contempts which is acknowledged to belong, and is daily exercised as belonging, to every superior court of law, of less dignity undoubtedly than itself" (*k*). This is the position established by him. The nucleus of Mr. Justice Bayley's careful argument is in these few words: "The House of Commons has not only a legislative character and authority, but is also a court of judicature." "If then the House be a court of judicature, it must" "have the power of supporting its own dignity as essential to itself; and without the power of commitment for contempts, it could not support its

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dignity" (l). Sir V. Gibbs, the Attorney General, who argued for the defendant, took the same ground of justification (m). It were "easy to show that every court in Westminster Hall has the same power of commitment for contempts, and that they could not exist long without such a power." "If then the right exist in the courts of Westminster Hall, upon what principle, it might then have been asked, could it be contended that the same right did not exist, and in the same degree, in the House of Commons" (n)? Such was the principle on which the Exchequer Chamber affirmed the judgment (o); and the question proposed by Lord Eldon in the House of Lords to the judges, before that tribunal of the last resort pronounced in favour of the House of Commons, confines it in the same manner (p). The decision manifestly rests on the privilege to punish for contempt, inherent no doubt in parliament and in each House, whether regarded in the legislative or in the judicial capacity, but which it only possesses in common with the courts of justice, and which was there exercised within the strictest bounds of common law.

This great case, solemnly argued at the bar, and on both sides with extraordinary learning and power, and in which the court evidently pursued their own enquiries in the interval between the arguments, presents a striking contrast to the rash and unmeasured language employed by former judges in *ex parte* proceedings, as writs of *habeas corpus*, and motions for criminal informations. Lord Ellenborough and Bayley, J., carefully guard themselves against adopting such expressions, the former dissenting directly from De Grey, C. J., the latter quoting without dissent the doctrine laid down by Holt in *Reg. v. Paty* (q). With the same freedom Lord Ellenborough

(l) 14 East, 159.

(m) *Id.* 85.

(n) *Id.* 86.

(o) *Burdett v. Abbot*, 4 Taunt. 401.

(p) 5 Dow. 199.

(q) 2 Ld. Raym. 1115.

commented, in *R. v. Creevey* (r), on Lord Kenyon's *dicta* in *R. v. Wright* (s). STOCKDALE
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To the assertion, that the courts have always acquiesced in the unlimited claim of privilege, I have already stated enough to authorise me in opposing the contrary assertion. I proceed to prove its truth in other instances. Judgment
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The phrases which I have selected for remark out of the cases cited are the exception, not the rule. From early times the spirit of English judicature has been more free and independent. Numerous cases were cited in the argument for the plaintiff, in *Burdett v. Abbot* (t), not required for the decision, except as they removed the preliminary obstacle to all discussion. They have been repeated in able tracts. Most of them were criticised by the Attorney General. He sought, and successfully in some, to shew that the question of privilege, under the circumstances, did not arise. But they are not cited for their circumstances; their use is to shew that the courts exercised the right of examining matters supposed to be protected from their enquiry by privilege of Parliament. For this purpose it is enough to enumerate, in the words of Prynne (u), "the cases of *Larke* (x), *Thorp* (y), *Clerke* (z), *Hyde* (a), *Attwyll* (b), *Walsh* (c), *Cosin* (d), *Ferrers* (e), and *Trewynnard* (f), which" (he says) "the Lord Chief Justice vouched, and insisted on in his learned argument of this case, to the great satisfaction of those of the long robe, and most auditors then present, as well members of the Commons House as others." *Cook's Case* (g), *Pledall's Case* (h), and others might be added. *The Duchess of Somerset's Case* (i), *Fitzharris's*

(r) 1 M. & S. 273.

(s) 8 T. R. 293.

(t) 14 East, 1.

(u) Regist. Part 4, p. 815.

(x) 1 Hats. Prec. 17.

(y) *Id.* 28.

(z) *Id.* 34.

(a) *Id.* 44.

(b) *Id.* 48.

(c) *Id.* 41.

(d) *Id.* 42.

(e) *Id.* 53.

(f) *Id.* 60.

(g) *Id.* 96.

(h) Cited 14 East, 47.

(i) Prynne's Reg. Part 4, p. 1214.

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Case (k), and others not necessary to be named, were of later date. The Chief Justice thus eulogised by Prynne was Sir O. Bridgman, delivering the judgment of the court in *Benyon v. Evelyn (l)*, who brings this result out of his examination of ancient authorities. "That resolutions or resolves of either House of Parliament, *singly*, in the absence of the parties concerned, are not so conclusive in courts of law, but that we may (with due respect nevertheless had to those resolves and resolutions), nay, we *must* give our judgment according as we, upon oath, conceive the law to be, though our opinions fall out to be contrary to those resolutions or votes of either House." That Bridgman, C. J., took upon himself to decide on privilege is so clear from his own plain words, that the opinion of Holt in *Ashby v. White (m)*, and of Holroyd in arguing *Burdett v. Abbot (n)*, cannot make us more certain of the fact. The Attorney General does not deny the proposition, but would parry its effect, by shewing that the circumstances appearing there, raised no question of privilege, and that what he was pleased to style the parade of learning on the subject was misapplied. But the Judge avowed his right and duty: if he invaded privilege of parliament, by laying down doctrines inconsistent with it, the invasion could not be less culpable because uncalled for by the cause in hand.

The next case to which I advert in truth embraced no question of privilege whatever; but, as one of the highest authorities in the state has thought otherwise, I shall offer some comments upon it; I mean *Jay v. Topham (o)*. The House of Commons ordered the defendant, their serjeant-at-arms, to arrest and imprison the plaintiff for having dared to exercise the common right of all Englishmen, of presenting a petition to the king on the state of

(k) 8 St. Tr. 223.

(l) O. Bridg. 324.

(m) 2 Ld. Raym. 938.

(n) 14 East, 49.

(o) 12 St. Tr. 821.

public affairs, at a time when no parliament existed. For this imprisonment an action was brought. The declaration complained, not only of the personal trespass, but also of extortion of the plaintiff's money practised by defendant under colour of the Speaker's warrant. The plea of justification under that warrant, which could not possibly authorise the extortion, even if it could the arrest, was over-ruled by this court, no doubt with the utmost propriety, for the law was clear; Lord Ellenborough points this out in the most forcible manner (*p*). Yet for this righteous judgment Pemberton, C.J., and one of his brethren were summoned before the Convention Parliament, when they vindicated their conduct by unanswerable reasoning, but were, notwithstanding, committed to the prison of Newgate for the remainder of the session. Our respect and gratitude to the Convention Parliament ought not to blind us to the fact that this sentence or imprisonment was as unjust and tyrannical as any of those acts of arbitrary power for which they deprived King James of his crown. It gave me real pain to hear the Attorney General contend that the two judges merited the foul indignity they underwent (*q*), as they had acted corruptly in concert with the Duke of York. In support of this novel charge, he produced no evidence, nor any other reason but that the plea (*r*) appears to have been in bar, and not to the jurisdiction. But the Commons, who knew their own motives, made no such charge: the record produced there, on which the judges were said to have violated the law, exhibits a bad plea for the reasons assigned by Lord Ellenborough; and the judgment punished by the Commons could not have been different without a desertion of duty by the judges.

We have arrived at the Revolution, in which Holt took

(*p*) 14 East, 109.

(*q*) *Ante*, p. 887.

(*r*) See 2 Nels. Abr. 1248, where

the plea set out is that in *Verdon v. Topham*; Sir T. Jones, 208.

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a conspicuous part. He owed to it the seat which he filled with such unrivalled reputation. On three several occasions he found himself compelled to deal with questions of privilege, and on all he gave his judgment against the claim. I shall not dwell minutely on *Knollys' Case(s)*, where he, with the whole court, came to a different conclusion from the House of Lords, as to the supposed Earl of Banbury's right to that title. The Attorney General asserted that that was no question of privilege, but merely whether an individual was a peer or not. One might have supposed that the issue, whether one claiming to be a member of either House of Parliament was such or not, had some relation to parliamentary privilege, especially when the restraint of his person on a criminal charge was involved in that question. The Lords considered it matter of privilege, and questioned the judges. But the matter, it seems, had not been formally referred to the House of Lords, and was not duly brought before them. They had, however, formally given judgment, and of that the court was informed. How could the court know that the Lords had proceeded extrajudicially, if utterly ignorant of parliamentary matters; or be permitted to enquire into their methods of proceeding, if their own subordinate station estopped them from questioning any act done by the paramount authority of a House of Parliament?

Without farther pressing *Knollys' Case*, I confess it was not without difficulty that I could trust the evidence of my own senses, when the Attorney General set aside the authority of *Ashby v. White (t)* by declaring that it was not a question of parliamentary privilege. If not, the three justices who differed from the Chief Justice were strangely deceived: the Chief Justice himself misapprehended both their reasoning and his own. The House of Lords was mistaken in their view of the subject,

(s) 12 St. Tr. 1167.

(t) 2 Lord Raym. 938.

when they adopted the Chief Justice's opinion against that of his three brethren. And the House of Commons was most of all ignorant of the truth, when (three days after the Lords had reversed the judgment of the Queen's Bench), being "informed that there had been an extraordinary judgment given in the House of Lords upon a writ of error from the Court of Queen's Bench, in a cause between Matthew Ashby and William White, wherein the privileges of the House were concerned" (*u*), they brought the proceedings before them, and after great debate resolved (*x*) that Ashby having, in contempt of the jurisdiction of the House, commenced such action, was guilty of a breach of their privileges, and that whoever should presume to do the like, and all attornies, solicitors, counsellors, serjeants-at-law, soliciting, prosecuting, or pleading in any such case, "are guilty of a high breach of the privilege of this House." The Lords (*y*), after full enquiry by a committee, resolved, on the other hand, "that the declaring Matthew Ashby guilty of a breach of the privilege of the House of Commons, for prosecuting an action against the constables of Aylesbury, for not receiving his vote at an election, after he had, in the known and proper methods of law, obtained a judgment in parliament for recovery of his damages, is an unprecedented attempt upon the judicature of parliament, and is in effect to subject the law of England to the votes of the House of Commons."

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And now we are gravely informed that this case concerned not the privileges of parliament. If, however, the opinion of all the judges and of both Houses, and of all historians and all lawyers till that assertion was made, be correct, then that case decided that the courts of law were not bound by the opinion of the Commons' House on matters of election, whereupon they claimed the sole right of judging, and had actually given judgment; but that

(*u*) 14 St. Tr. 696.

(*x*) *Ante*, p. 861.

(*y*) 14 St. Tr. 799.

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the law must take its course, as if no such judgment had been given by the House of Commons, and no such privilege claimed. On this point the decision has never to my knowledge been impugned in any of our courts. Lord Mansfield is supposed to have dissented from it, but his doubt applies to the form of declaration merely; and his own practice at the bar (z), of asking leave of the House of Commons to commence such actions, proves only his cautious desire to avoid and avert from his clients the doom denounced against Ashby, Paty, and their brother burgesses and others *in pari delicto*, their counsel and attornies.

In the case commonly designated as *The Case of the Men of Aylesbury* (a), a question of the utmost difficulty and importance was brought before the same Chief Justice and the Court of King's Bench. The House of Commons, acting on the resolution thus cited, pronounced those persons guilty of the breach of privilege there prohibited, and sent them to Newgate for a contempt in bringing their action. They sued out their *habeas corpus*. Holt, in a judgment of the highest excellence, gave such reasons for restoring them to liberty as it is easier to out-vote than answer: the other three judges thought the adjudication of the House of Commons on a contempt brought before them could not be gainsayed in that proceeding. The judges of the other courts are understood to have concurred with the majority in the Queen's Bench: and the opinion just cited must be taken as that of eleven judges against one. But the other eight could only have stated their first impression, without publicity, and without hearing the argument. There is no satisfaction in dwelling on the angry contests between the two Houses which ensued. The peculiarity of the circumstances leaves a doubt whether the law can be considered as settled by what then occurred (b). But, even supposing that

(z) 14 East, 59 (b).

1105; ante, p. 862.

(a) *Reg. v. Paty*, 2 Ld. Raym.

(b) See 14 East, 92, n. (b).

this Court would be bound to remand a prisoner committed by the House for a contempt, however insufficient the cause set out in the return, that could only be in consequence of the House having jurisdiction to decide upon contempts. In this case we are not trying the right of a subject to be set free from imprisonment for contempt, but whether the order of the House of Commons is of power to protect a wrong-doer against making reparation to the injured man.

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When the judges were supposed to have unanimously agreed to surrender their right of examining whatever may have been done by authority of parliament, some very important declarations by some of the most eminent among them must have been forgotten. Willes, C. J., avowed the contrary resolution (c).

What was said by Lord Mansfield in the House of Lords respecting the privileges of the other House in the Middlesex election, is the more weighty, because he was then upholding the privilege of the latter in election matters (d): "Declarations of the law," said he, "made by either House of Parliament, were always attended with bad effects: he had constantly opposed them whenever he had an opportunity, and in his judicial capacity thought himself bound never to pay the least regard to them." He exemplified this remark by reference to general warrants: although thoroughly convinced of their illegality, "which indeed naming no persons were no warrants at all, he was sorry to see the House of Commons by their vote declare them to be illegal. That it looked like a legislative act which yet had no force nor effect as a law: for supposing the House had declared them to be legal, the Courts in Westminster would nevertheless have been bound to declare the contrary; and consequently to throw a disrespect on the vote of the House." "He made a

(c) *Wynne v. Middleton*, 1 Wils.

(d) 16 Parl. Hist. 653.

123; *ante*, p. 871.

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wide distinction between general declarations of law, and the particular decision which might be made by either House in their judicial capacity, on a case coming regularly before them, and properly the subject of their jurisdiction." "Here" (that is in a case of election) "they did not act as legislators, pronouncing abstractedly and generally what the law was, and for the direction of others; but as judges, drawing the law from the several sources from which it ought to be drawn, for their own guidance in deciding the particular question before them, and applying it strictly to the decision of that question."

The dispute between the two Houses in 1784 (*e*), when the Commons issued a kind of mandate to the Treasury to suspend the payment of certain bills till the House should further direct, was in fact a struggle between the two great parties in the country. The Lords by a large majority condemned that proceeding, and resolved (as the same House had almost in corresponding terms resolved at the close, in 1704, of *The Aylesbury Case*)—"That an attempt, in any one branch of the legislature, to suspend the execution of the law, by separately assuming to itself the direction of a discretionary power, which, by an Act of Parliament, is vested in any body of men to be exercised as they shall deem expedient, is unconstitutional" (*f*). The doctrine was enlarged upon by Lord Thurlow, who spoke of the resolutions of the House of Commons in terms preserved by tradition, which there might be impropriety in repeating. The Commons defended their resolution by asserting that, in fact, it did not fairly bear the import ascribed to it. Lords Mansfield and Loughborough took the same line in answering Lord Thurlow, both fully admitting with him, that the Commons have no power to suspend the law by their resolutions. The former said (*g*), that "for either branch of

(*e*) See 24 Parl. Hist. 494, *et seq.*

(*g*) *Id.* 517.

(*f*) 24 Parl. Hist. 497.

the legislature to attempt to suspend the execution of the law, was undoubtedly unconstitutional." "It had been stated as a ground for voting it (*h*), that the House of Commons had come to a resolution militating against a clause of the 21st of the present king. What then? A resolution of the House of Commons would not suspend the law of the land. A resolution of the House of Commons, ordering a judgment to be given in any particular manner, would not be binding in the Courts of Westminster Hall."

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Nor can I refrain from quoting the characteristic burst of sentiment with which Lord Erskine remarked in 1810 on some censure cast on Sir Francis Burdett, for appealing to the law against the legality of the Speaker's warrant. "No man would more zealously defend the privileges of parliament, or of either House of Parliament, than he should; and he admitted, that what either branch of the legislature had been for the course of ages exercising with the acquiescence of the whole legislature, would, in the absence of statutes," "be evidence of the common law of parliament, and, as such, of the common law of the land. The jurisdiction of courts rested in a great measure upon the same foundation: but, besides that, these precedents, as applicable alike to all of them, were matters of grave and deliberate consideration; they were, and must be, determined in the end by the law." "The contrary was insisted upon by the Commons, when they committed Lord Chief Justice Pemberton for holding plea of them in his Court; but so far was he from considering such a claim as matter of argument under this government of law, that I say advisedly," said his lordship, "that if, upon the present occasion, a similar attack was made upon my noble and learned friend (Lord Ellenborough) who sits next me, for the exercise of his legal jurisdiction, I would resist the usurpation with my strength, and

(*h*) The proposed resolution of the House of Lords.

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bones and blood." "Why was any danger" "to be anticipated by a sober appeal to the judgment of the laws? If" "the judges had no jurisdiction over the privileges of the House of Commons, they would say they had no jurisdiction. If they thought they had, they would give a just decision according to the facts and circumstances of the case, whatever they might be" (i).

After these decisions in our Courts, and these strong and vehement declarations of opinion, by some of the greatest luminaries of the law, it is too much to seek to tie our hands by the authority of all our predecessors.

On Lord Brougham's judgment in the case of *Mr. Long Wellesley*, lately published by himself (k), for obvious reasons I shall observe but shortly. He adopted in its fullest terms the resolution expressed by Willes, C. J. (l), and carried it no farther, though his form of expression is perhaps more striking and forcible. "If instead of justly, temperately, and wisely abandoning this monstrous claim, I had found an unanimous resolution of the House in its favour, I should still, (and it is this which made me interpose to assure the counsel that I needed not the resolution of the House of Commons in favour of the Court of Chancery), I should still have steadily pursued my own course, and persisted in acting according to what I knew to be the law" (m). A declaration the more remarkable, as proceeding from a judge long known as the champion of all popular rights, the jealous assertor of all the real privileges of that assembly, where his station and his services may be thought to place his name on a level, at least, with the greatest of all those, either lawyers or statesmen, who have come after him upon the same stage.

It is indeed true that that avowal of opinion was no

(i) 16 Parl. Deb. 851. See *Burdett v. Abbot*, 5 Dow, 200.

(l) 1 Wils. 128.

(k) Lord Brougham's Speeches, vol. iv. p. 357. See 2 Russ. & My. 639.

(m) *Long Wellesley's Case*, 2 Russ. & My. 660.

more necessary for the decision than perhaps the discussion of Bridgman, C. J., and the declared resolution of Willes, C. J. But would that circumstance render the sentiment less offensive, if it really assailed the independence and dignity of the House of Commons? Quite the contrary. Yet there was no committee, no resolution, no menace.

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Two admissions were made by the Attorney General in the course of his argument here, either of which appears to me fatal to his case. He very distinctly recognised the words of Lord Mansfield, that, if either House of Parliament should think fit to declare the general law, that declaration is undoubtedly to be disregarded, adding that it should be treated with contempt. Now such declaration would be a proceeding of the House, and so above all enquiry.

Again, if the due subordination of Courts is the guiding principle, the declaration, even if against law, by a superior court, demands respect and deference, if not acquiescence. But the declaration of general law may arise in the course of an enquiry respecting privilege: the claim advanced by the report of the committee (n) is that the House is the sole and exclusive judge of the *extent* of its own privileges, and the Attorney General, in the same spirit, informed us, on the part of the House of Commons, of his and their "confidence that, when we should be informed that the act had been done in the exercise of a privilege, we should hold that we could no longer enquire into the matter." He warned us that, this being a question of privilege, we have no power to decide it; and told us that whenever either House claims to act in exercise of a power which it claims, the question of privilege arises. But, if the claim were to declare a general law, the Attorney General agrees that no weight would belong to

(n) Report from the Select Committee on publication of printed papers, May 8th, 1837.

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it. Clearly then the Court must enquire whether it be a matter of privilege, or a declaration of general law, as indisputably, if it be a matter of general law, it cannot cease to be so by being invested with the imposing title of privilege.

The other concession to which I alluded is, that, when matter of privilege comes before the Courts not directly but incidentally, they may, because they must, decide it. Otherwise, said the Attorney General, there would be a failure of justice. And such has been the opinion even of those judges who have spoken with the most profound veneration of privilege. The rule is difficult of application. Lord Ellenborough and the Court, as well as the defendant's learned counsel, felt it to be so, in *Burdett v. Abbot* (o). The learned Report of the select committee (p) states in direct terms, that they "have not been able to discover any satisfactory rule or test by which to ascertain in all cases whether the question of privilege would be deemed to arise directly or incidentally; there are many cases which might be decisively placed in the one class or the other, but there may be also very many which cannot be so assigned."—"Your committee are of opinion, that the Courts have no jurisdiction to decide upon privilege, either directly or incidentally, in any sense inconsistent with the independence and exclusive jurisdiction of parliament. If such a jurisdiction did exist of deciding incidentally upon privilege, uncontrolled by parliament, it would lead to proceedings as incongruous, and as effectually destructive of the independence of parliament, as if the direct jurisdiction existed; a consequence which, together with the extreme uncertainty of the extent of the rule, makes it indispensably necessary that it should be investigated."

The report seems to consider that the question of privilege arose incidentally in the former trial between

(o) 14 East, 1.

(p) Report, &c., *supra*.

these parties, and points out very serious inconveniences that may flow from according to courts of justice this power of deciding incidentally. The opinion that the Courts have no jurisdiction to decide upon privilege, either directly or incidentally, undergoes some apparent qualification by a reference to the sense in which the words are used. It appears that the Courts have no such jurisdiction "in any sense inconsistent with the" "exclusive jurisdiction of parliament" (q). I would not venture to speak with absolute certainty of the meaning of this passage; but I imagine that a body which has no jurisdiction to act in any sense inconsistent with the exclusive jurisdiction of another body can possess no jurisdiction at all. I think, then, it must be assumed, that the committee of the House of Commons declared that the Courts have no jurisdiction whatever to decide even incidentally on any matter of privilege; their resolutions having reference to this preceding part of their report.

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Now this power is denied to the Courts by this report for the first and only time. Even the Appendix (r) to it, which by being published by the same authority I know not well how to disjoin from it, returns to that same distinction between the direct and incidental occurrence of questions of privilege which the report and resolutions appear to repeal. It were to be wished that the late House of Commons had laid down their rule for the guidance of the Courts in language less open to dispute as to its meaning; but we in this case must feel relieved from all embarrassment, by the frank acknowledgment of the Attorney General. If, then, we may be under the obligation of deciding on privilege, even though incidentally, it follows that we have some knowledge on the subject, or at least the means of obtaining knowledge. The report takes for granted that, if either House has actually come to a decision on the point thus raised, we

(q) Report, &c., P. 13, s. 60.

(r) See Appendix, No. 3, pp. 25—29.

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should be bound to adhere to it : and the Attorney General insisted that, even if in the present case the question did but arise incidentally, we should be bound by the declaration of the law set forth by the House in any formal statement of its opinion.

Our duty would then be to interpret the law laid down by one House by discovering its meaning. But after ascertaining it as best we might from these stores of parliamentary learning from which we are pronounced to be excluded, we might possibly find that the other House (or the same House at another time) had come to an opposite declaration. What course must we then take? How reconcile the discrepancy? Perhaps it may be said that the fact is not to be presumed. I agree that it is not; but it exists at this moment with reference to the legal rights of parties in the matter that arose in *Ashby v. White* (s). This Court could not decide the matter either way, without overruling what has been laid down either by Lords or Commons, and thus violating the privileges of parliament, and rendering ourselves amenable to just displeasure.

But suppose an entirely new point to arise, and some party litigating here to set up a claim of privilege never heard of before, as to which, therefore, neither House had ever framed a resolution.

Since, then, the courts may give judgment on matters of privilege incidentally, it is plain that they must have the means of arriving at a correct conclusion, and that they may differ from the House of Parliament, as Holt and the Court of Queen's Bench differed from the Lords in the *Banbury Case* (t), as he did in *Paty's Case* (u), and as the same and many other of the judges as well as the Lords did from the Commons in the case of *Ashby v. White* (x), and as I trust every Court in Westminster

(s) 2 Ld. Raym. 933.

(t) 12 St. Tr. 1167.

(u) *Ante*, p. 862.

(x) *Ante*, p. 843.

Hall would have done, if an order of either House, pur-
 porting to be made by virtue of the privilege of parlia-
 ment, had been brought before them as a justification
 for the imprisonment of a subject of this free state, for
 killing Lord Galway's rabbits (*y*), or fishing in Admiral
 Griffin's pool (*z*).

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In truth, no practical difference can be drawn between
 the right to sanction all things under the name of privi-
 lege, and the right to sanction all things whatever, by
 merely ordering them to be done. The second proposition
 differs from the first in words only. In both cases the
 law would be superseded by one assembly; and, however
 dignified and respectable that body, in whatever degree
 superior to all temptations of abusing their power, the
 power claimed is arbitrary and irresponsible, in itself the
 most monstrous and intolerable of all abuses.

Before I finally take leave of this head of the argu-
 ment, I will dispose of the notion that the House of
 Commons is a separate court, having exclusive juris-
 diction over the subject matter, on which, for that reason,
 its adjudication must be final. The argument placed the
 House herein on a level with the Spiritual Court and the
 Court of Admiralty. Adopting this analogy, it appears to
 me to destroy the defence attempted to the present action.
 Where the subject matter falls within their jurisdiction,
 no doubt we cannot question their judgment; but we are
 now enquiring whether the subject matter does fall within
 the jurisdiction of the House of Commons. It is con-
 tended that they can bring it within their jurisdiction by
 declaring it so. To this claim, as arising from their privi-
 leges, I have already stated my answer: it is perfectly
 clear that none of these Courts could give themselves
 jurisdiction by adjudging that they enjoy it.

3. I come at length to consider whether this privilege
 of publication exists. The plea states the resolution of

(*y*) 23 Comm. Journ. 505.

(*z*) *Ante*, p. 898.

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the House that all parliamentary reports printed for the use of the House should be sold to the public, and that these several papers were ordered to be printed, not however stating that they were printed for the use of the House. It then sets forth the resolution and adjudication before set out. We know, by looking at the documents referred to at the bar, that this resolution and adjudication could not justify the libel complained of, because it was not in fact passed till after action brought. But, passing over all minor objections, I assume that the defendant has properly pleaded a claim, on the part of the House, to authorise the indiscriminate publication and sale of all such papers as the House may order to be printed for the use of its members.

The Attorney General would preclude us from commencing this enquiry. He protests against our taking any other step than that of recording the judgment already given in the Superior Court, and registering the edict which Mr. Hansard brings to our knowledge. But, having convinced myself that the mere order of the House will not justify an act otherwise illegal, and that the simple declaration that that order is made in exercise of a privilege does not prove the privilege, it is no longer optional with me to decline or accept the office of deciding whether this privilege exist in law. If it does, the defendant's prayer must be granted and judgment awarded in his favour; or, if it does not, the plaintiff, under whatever disadvantage he may appear before us, has a right to obtain at our hands, as an English subject, the establishment of his lawful rights and the means of enforcing them.

In the first place, I would observe that the act of selling does not give the plaintiff any additional ground of action, or right to redress at law, beyond the act of publishing. The injury is precisely the same in its nature, whether the publication be for money or not, though it may be much more extensively injurious when scattered over the

land for profit. But the direction to sell is highly important in this respect, that public sale necessarily imports indiscriminate publication beyond recal or control, and holds out the same authority as a protection to every subordinate vendor, who, by purchase from their printer and bookseller, is, like him, doing no more than giving effect to an order of the House.

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How far it is strictly constitutional for either House of Parliament to raise money by sale or otherwise, and apply it to objects not specified by Act of Parliament, might require consideration on general grounds, but does not belong to the present season or place, in which we have only to deal with the manner in which the mutual rights of the parties before us in this action are affected.

It is likewise fit to remark that the defamatory matter has no bearing on any question in Parliament, or that could arise there. Whether the book found in the possession of a prisoner in Newgate were obscene or decent could have no influence in determining how prisons can best be regulated; still less could the irrelevant issue whether it was published by the plaintiff. The most advisable course of legislation on the subject is wholly unconnected with those facts: the inquisitorial functions would be exercised with equal freedom and intelligence, however they were found to be. And, if the ascertainment of them by the House was a thing indifferent, still less could the publication of them to the world answer any one parliamentary purpose.

The proof of this privilege was grounded on three principles, — necessity, — practice, — universal acquiescence. If the necessity can be made out, no more need be said: it is the foundation of every privilege of parliament, and justifies all that it requires. But the promise to produce that proof ended in complete disappointment. It consisted altogether in first adopting the doctrine of *Lake v. King (a)*, that printing for the use of the members

(a) 1 Saund. 131.

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is lawful, and then rejecting the limitation which restricts it to their use. The reasoning is, "If you permit the number of copies to be as large as the number of members, the secret will not be confined to them." A strong appeal to justice and expediency against printing, even for the use of the members, what may escape from their hands to the injury of others, but surely none, in point of law, for throwing down the only barrier that guards the rest of the world against calumny and falsehood founded on *ex parte* statements, made for the most part by persons interested in running down the character assailed.

The case just alluded to drew a line, in the nineteenth year of Charles II., which has always been thought correct in law. The defendant justified the libel he had printed, by pleading that it was only printed for the use of the members. Much doubt at first existed whether the justification were good in law; the right of delivering copies for the use of the members of a committee being undisputed, but some of the judges questioning whether printing could be so justified. After an advisement of many terms and even of some years, Lord Hale and the Court sustained the defence, because, being necessary to their functions, it was the known course in parliament to print for the use of members. But wherefore all this delay and doubt, if the House *then* claimed the privilege of authorizing the publication of all papers before them? or how can we believe that the defendant would not have pleaded at first that privilege, when we find that he was admitted to have acted according to the course and proceedings of parliament, if it was then their understood right? This case occurred within a very few years of *Benyon v. Evelyn* (*b*), which must have excited the attention of the House, and made them vigilant in maintaining their privileges against the improper interference from courts of law.

The supposed necessity soon dwindled, in the hands of the learned counsel, down to a very dubious kind of expediency; for it is not much better, said he, that a man defamed, and thence avoided by mankind, should know he has been the victim of a privileged publication, than remain ignorant by what means he has lost his place in society? A question over which many a man might wish to pause before he answered it. It is far from certain that he would become acquainted with the fact; he might be absent on business, or abroad in the service of his country; but the discovery when made would bring him small comfort, as it would shew him that his enemy was too strong to grapple with, and that the door of legal redress must be barred against him for ever.

Another ground for the necessity of publishing for sale all the papers printed by order of the House was, that members might be able to justify themselves to their constituents, when their conduct in parliament is arraigned, appealing to documents printed by authority of the House. This is precisely the principle denied and condemned by Lord Ellenborough and the Court in *R. v. Creevey* (c), a decision which it may now perhaps be convenient to censure as inconsistent with privilege, but which, founded on Lord Kenyon's authority in *R. v. Lord Abingdon* (d), has been uniformly regarded till this time as a just exposition of the law. But indeed it is scarcely possible for ingenuity to fancy a case in which a member, accused of any misconduct in his trust, should be able to vindicate himself by resorting to such documents. Then, on general grounds, the necessity of making the parliamentary conduct of members known to their constituents is urged, and the duty of the House of Commons to convey instruction to the people. The latter argument may be answered by asserting that the duty of general instruction resides in the whole Legislature, and not in any single

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(c) 1 M. & S. 273.

(d) 1 Esp. 226.

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branch of it. The former argument proves too much; for the conduct of the representative is best disclosed by the share taken by him in the debates, which from all time up to the present moment have been, not only neither sold nor published by the House, but cannot be published by the most accurate reporter without his incurring the danger of Newgate for breach of privilege, and being exposed without justification to legal consequences.

It can hardly be necessary to guard myself against being supposed to discuss the expediency of keeping the law in its present state, or introducing any and what alterations. It is no doubt susceptible of improvement; but the improvement must be a legislative act (*e*). If we held that any improvement, however desirable, could be effected under the name of privilege, we should be confounding truth, and departing from our duty; and if, on such considerations, either House should claim, as matter of privilege, what was neither necessary for the discharge of their proper functions, nor ever had been treated as a privilege before, this would be an enactment, not a declaration; or, if the latter name were more appropriate, it would be the declaration of a general law, to be disregarded by the Courts, though never, I hope, treated with contempt. It would also be the declaration of a new law; and the word "adjudge" can make no difference in the nature of the thing.

The practice, or usage, is the second ground, on which the Attorney General seeks to rest this privilege; and he has a warrant for his claim, which, if well founded, is even stronger than any opinion of necessity: he refers to an Act of Parliament.

The Postage Act (*f*), it seems, conveys all parliamentary proceedings to all parts of the empire free of expense.

(*e*) See now 3 & 4 Vict. c. 9, *post*,
p. 965.

(*f*) 42 Geo. 3, c. 63. See stats. 7
Will. 4 and 1 Vict. c. 32, c. 34.

And, forasmuch as, when that Act passed, it was notorious that the votes and other proceedings contained matter criminating individuals, therefore, it was argued, the legislature must have intended to circulate such criminating matter. But the same Act requires newspapers to be circulated free of postage: it was equally notorious that newspapers often contained libels; yet it was never contended that the Postage Act intended to give impunity to their circulation. In both cases it is clear that the Act merely gave untaxed circulation to such proceedings and such papers as it was before lawful to circulate, leaving all questions of what is lawful in their former plight.

But "the practice has prevailed from all time." If so, it is strange that no vestiges of it are tracked to an earlier period than 1640, when the House of Commons, acting neither in a legislative nor an inquisitorial capacity, began to set up an authority independent of the Crown, and hostile to it, which led to its gradually absorbing all the powers of the State. For near twenty years the House was taking this executive part, which they could not carry on but by publishing their votes and proceedings. At the Restoration they made some amends to the exiled king, by evincing their loyalty in the same manner; and their vows of allegiance and submission were also sold and published, as their manifestoes and levies of men and money against his father had been before. Thus does the practice appear to have originated in the Long Parliament, and to have been continued at the Restoration. The origin disproves the antiquity of the privilege, or its necessity for the functions of one of the three estates; no such necessity was thought of till one began to struggle against the other two for an ascendancy which reduced them to nothing. True it is, the practice of so printing and publishing has proceeded with little interruption till this hour. But the question is not on the lawfulness or expediency of printing and publishing in general; it is whether any proof can be

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found of a practice to authorize the printing and publication of papers injurious to the character of a fellow subject. Such a privilege has never been either actually or virtually claimed by either House of Parliament: the notice of neither has been called to the fact of their giving publicity to writings of that character. What course they might have taken we cannot know, if a party thus injured had laid his grievance before them. Had their answer been, We claim the right to promulgate our judgment on cases within our jurisdiction, on which we have made inquisition, heard evidence and defence, and formed our judgment,—they would have referred to a state of things wholly different from that which is now before us. If they had said, We claim the privilege of ordering the printing of what we please, and of publishing all we print, however partial the statement, and however ruinous to individuals, the question of their right to justify the publisher would have been much the same as that which we have now under discussion.

The practice of a ruling power in the state is but a feeble proof of its legality. I know not how long the practice of raising ship-money had prevailed before the right was denied by Hampden; general warrants had been issued and enforced for centuries before they were questioned in actions by Wilkes and his associates (*g*), who, by bringing them to the test of law, procured their condemnation and abandonment. I apprehend that acquiescence on this subject proves, in the first place, too much; for the admitted and grossest abuses of privilege have never been questioned by suits in Westminster Hall. The most obvious reason is, that none could have commenced a suit of any kind for the purpose, without incurring the displeasure of the offended House, instantly enforced, if it happened to be sitting, and visiting all who had been concerned. During the session, it must

(*g*) *Ante*, pp. 522, *et seq.*

be remembered that privilege is more formidable than prerogative, which must avenge itself by indictment or information, involving the tedious process of law, while privilege, with one voice, accuses, condemns, and executes. And the order to "take him," addressed to the serjeant-at-arms, may condemn the offenders to persecution and ruin. Who can wonder that early acquiescence was deemed the lesser evil, or gravely argue that it evinced a general persuasion that the privilege existed in point of law?

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Besides, the acquiescence could only be that of individuals in particular hardships, brought upon themselves by the proceedings published. We have a right to suppose that a considerate discretion was fairly applied to the particular circumstance of each case; that few things of a disparaging nature were printed at all; that, where criminating votes were allowed to meet the public eye, they were justified as an exercise of jurisdiction upon matters properly brought before parliament, after patient hearing, and candid inquiry; that the imputations were generally true, and actions for libel would only have made them more public; and that, even where *ex parte* proceedings were printed to the annoyance of private persons, that minute suffering would be lost sight of in the general sense of an overwhelming necessity. All kinds of prudential considerations, therefore, conspired to deter from legal proceedings, and will fully account for the acquiescence; and the difference between the extent of publication formerly practised and the uncontrolled sale of all that the House may choose to print in order to raise a fund for paying its officers cannot fail to strike every unbiassed understanding.—

The Chief Justice, after making some observations upon the Report of the Committee of the late House of Commons, appointed to examine into the subject (*h*),

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concluded:—I am of opinion, upon the whole case, that the defence pleaded is no defence in law, and that our judgment must be for the plaintiff on this demurrer.

LITTLEDALE, J., observed, *inter alia*,—In the case of a commitment for contempt, there is no doubt but the House is the sole judge whether it is a contempt or not; and the Courts of Common Law will not inquire into it (*i*). Not only the two Houses of Parliament, but every Court in Westminster Hall, are themselves the sole judges whether it be a contempt or not: although, in cases where the Court have professed to commit, not for a contempt, but for some matter which by no reasonable intendment could be considered as a contempt of the Court committing, the ground of commitment being palpably and evidently unjust, and contrary to law and natural justice, Lord Ellenborough says (*k*) that, in the case of such a commitment, if it should ever occur, the Court must look at it, and act upon it, as justice may require, from whatever court it may profess to have proceeded.

The Bill of Rights (*l*), declares that the freedom of speech and debates on proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament. I think this is not such a proceeding in parliament as the Bill of Rights refers to; it is something out of parliament. The privileges of parliament appear to me to be confined to the walls of parliament, for what is necessary for the transaction of the business there, to protect individual members so as that they may always be able to attend their duties, and to punish persons who are guilty of contempts to the House, or against the orders and proceedings or other matters relating to the House, or to individual members in discharge of their duties to the House, and to such other matters

(*i*) See *post*, *Case of the Sheriff of Middlesex*, 11 A. & E. 273.

(*k*) 14 East, 150.

(*l*) 1 Will. & M., sess. 2, c. 2.

and things as are necessary to carry on their parliamentary functions; and to print documents for the use of the members. But a publication sent out to the world, though founded on and in pursuance of an order of the House, in my opinion, becomes separated from the House: it is no longer any matter of the House, but of the agents they employ to distribute the papers; those agents are not the House, but, in my opinion, they are individuals acting on their own responsibility as other publishers of papers.

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PATTESON, J.—Three questions appear to arise on this record.

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I. Whether an action at law will lie in any case for any act whatever admitted to have been done by the order and authority of the House of Commons.

II. Whether a resolution of the House of Commons, declaring that it had power to do the act complained of, precludes this Court from inquiring into the legality of that act.

III. If such resolution does not preclude this Court from inquiring, then whether the act complained of be legal or not.

I. With respect to the first question, it has not been contended in argument that either House of Parliament can authorise any person to commit with impunity a known and undoubted breach of the law. Extravagant cases have been sometimes put, illustrating the impossibility of maintaining such a proposition. It has been answered truly, that it is not decent or respectful to those high assemblies to suppose that such extravagant cases should arise. But less extravagant cases have arisen in which both Houses of Parliament have confessedly exceeded their powers in punishing persons for trespasses on the lands of members, and other matters wholly without their jurisdiction, but which they have treated as questions of privilege. And, though no instance has been cited of any action having been brought, but,

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on the contrary, the persons proceeded against have very commonly submitted to the illegal treatment they have met with, yet surely the maxim of law must apply, viz., that there is no wrong without a remedy; and where can the remedy be but by action in a court of law against those who have done the injury? If it be once conceded that either House of parliament can make an illegal order, it must necessarily follow that the party wronged may have redress against those who carry such illegal order into effect: and how can he have such redress but by action at law? Great difficulties may undoubtedly arise in distinguishing between acts done *in* the House, and *out* of the House under orders given *in* the House, and in determining against whom such action would lie. It is clear that no action can be maintained for anything said or done by a member of either House in the House: and the individual members composing the House of Commons, whether it be a court of record or not, may, like other members of a court of record, be free from personal liability on account of the orders issued by them as such members. Yet, if the orders themselves be illegal, and not merely erroneous, upon no principle known to the laws of this country can those who carry them into effect justify under them. A servant cannot shelter himself under the illegal orders of his master. Nor could an officer under the illegal orders of a magistrate, until the legislature interposed and enabled him to do so. The mere circumstance, therefore, that the act complained of was done under the order and authority of the House of Commons, cannot of itself excuse that act, if it be in its nature illegal: and it is necessary, in answer to an action for the commission of such illegal act, to shew, not only the authority under which it was done, but the power and right of the House of Commons to give such authority. This point indeed was not pressed upon the argument of this case; but I have mentioned it because it seems to me that it will be very difficult to maintain the affir-

mative of the second question, if this first point be given up.

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II. The second question is, as I conceive, raised upon this record, by the declaratory resolution of the 31st of May, 1837, set out at the conclusion of the plea (*m*). The other resolutions and orders set out in the plea are not declaratory of the power or privilege of the House, but directory only: and, as it has been shewn that it is possible that the House, however unintentionally, may make illegal orders, and that, if it should do so, those who carry them into effect may be proceeded against by action at law, it follows that the court in which such action is brought must, upon demurrer, inquire into the legality of those directory orders, and cannot be precluded from doing so by the mere fact of those orders having been made.

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The proposition is certainly very startling, that any man, or body of men, however exalted, except the three branches of the Legislature concurring, should, by passing a resolution that they have the power to do an act illegal in itself, be able to bind all persons whatsoever, and preclude them from inquiring into the existence of that power and the legality of that act. Yet this resolution goes to that extent; for, unless it is taken to mean that the House of Commons has power to order the publication of that which it knows to be defamatory of the character of an individual, and to protect those who carry that order into effect from all consequences, it will not avail the defendants in this action. I take the resolution, therefore, to have that meaning, though the language of it does not necessarily so import.

It is further argued that the courts of law are inferior courts to the Court of Parliament and to the Court of the House of Commons, and cannot form any judgment as to the acts and resolutions of their superiors. I admit fully

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that the Court of Parliament is superior to the courts of law; and in that sense they are inferior courts: but the House of Commons by itself is not the Court of Parliament. With respect to the interpretation and declaration of what is the existing law, the House of Lords is doubtless a superior court to the courts of law. And those courts are bound by a decision of the House of Lords expressed judicially upon a writ of error or appeal, in a regular action at law or suit in equity; but I deny that a mere resolution of the House of Lords, or even a decision of that House in a suit originally brought there (if any such thing should occur, which it never will, though formerly attempted), would be binding upon the courts of law, even if it were accompanied by a resolution that they had power to entertain original suits: much less can a resolution of the House of Commons, which is not a court of judicature for the decision of any question either of law or fact between litigant parties, except in regard to the election of its members, be binding upon the courts of law. And it should be observed that, in making this resolution, the House of Commons was not acting as a court either legislative, judicial, or inquisitorial, or of any other description. It seems to me, therefore, that the superiority of the House of Commons has really nothing to do with the question.

Upon the whole, the true doctrine appears to me to be this: that every court in which an action is brought upon a subject-matter generally and *primâ facie* within its jurisdiction, and in which, by the course of the proceedings in that action, the powers and privileges and jurisdiction of another court come into question, must of necessity determine as to the extent of those powers, privileges and jurisdiction: that the decisions of that court, whose powers, privileges, and jurisdiction are so brought into question, as to their extent, are authorities, and, if I may so say, evidences in law upon the subject, but not conclusive. In the present case, therefore, both

upon principle and authority, I conceive that this court is not precluded by the resolution of the House of Commons of May, 1837, from inquiring into the legality of the act complained of, although we are bound to treat that resolution with all possible respect, and not by any means to come to a decision contrary to that resolution unless we find ourselves compelled to do so by the law of the land, gathered from the principles of the common law, so far as they are applicable to the case, and from the authority of decided cases, and the judgments of our predecessors, if any be found which bear upon the question.

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III. I come then to the third question: Whether the act complained of be legal or not. I do not conceal from myself that, in considering this point, the resolution of the House of Commons of 31st May, 1837, is directly called in question; but, for the reasons I have already given, I am of opinion that this court is, not only competent, but bound, to consider the validity of that resolution, paying all possible respect, and giving all due weight, to the authority from which it emanates.

Beyond all dispute it is necessary that the proceedings of each House of Parliament should be entirely free and unshackled; that whatever is done or said in either House should not be liable to examination elsewhere; therefore no order of either House can itself be treated as a libel, as the Attorney General supposed it might if this action would lie. No such consequence will follow.

COLERIDGE, J.—Two great questions have been discussed upon the argument. I. The first, and immeasurably the more important, of these is, whether it be competent to the Court, after the disclosure by the plea that the House of Commons has declared itself to have the power of publishing any report, vote, or proceeding, the publication whereof it deems necessary or conducive to the public interests, to inquire whether by law the House has such power. Although not in form a plea to the jurisdiction, and wanting one essential incident to such a plea, if we answer this

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question in the affirmative it would in effect lead to much the same consequences. We should not indeed dismiss the plaintiff from our Court to another tribunal competent to give him relief, for none such is alleged to exist; but we should give judgment against him ministerially rather than judicially, on the ground that the act complained of was done in the exercise of a power, as to which the whole jurisdiction, both to declare its existence and to decide on the propriety of its exercise in the individual case, was beyond our competence, and exclusively in the body by whom the very act was done. According to this argument, the plea in form leaves a matter for our decision, but in substance prescribes conclusively the judgment to be pronounced. It must be admitted that this is a very startling conclusion: and certainly it must not be confounded with cases to which it has been likened, where, the question in a cause turning upon foreign law or any of those branches of our own law administered in courts of peculiar jurisdiction, we decide it, not according to the common law, but according to what we suppose would have been the decision in the foreign or the peculiar court. Then we inquire, by such lights as we can procure, what that law, foreign or peculiar, may be; and, when we have ascertained it, we apply the facts to it, and decide accordingly. Neither, again, is this to be confounded with cases in which, after an adjudication by a foreign or peculiar court upon the same facts between the same parties, one shall bring the other before us in the way of original suit; there, indeed, and upon a distinct principle, if the fact of such adjudication be properly pleaded and proved, or admitted, the further agitation of the question will not be permitted: we do not profess to decide upon the merits of the case: the existence of the former judgment in full force is, by our own law itself, a legal bar to the second recovery or a new agitation of the matter. We are now, however, called upon to abstain from all inquiry, in a case in which the existence of the law is not substantively

alleged in the plea (for as the House, it is admitted, cannot make the law, the resolution declaring it is only *evidence* of its existence, and not an *allegation* of it), where it does not appear that the particular facts have ever been adjudicated on, and where the particular order, under which the act complained of was done, is not distinctly brought within the law as said to have been declared.

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All this, however, has been maintained upon the footing of privilege. It is said the Commons have declared that they have this privilege, and the act has been done in the exercise of the privilege, but a court of law can neither inquire whether they have the privilege, nor whether the case falls within it, because the House of Commons alone is to judge of its own privileges: the Court, therefore, to use the words of the Attorney General, has "nothing to do but to give judgment for the defendants."

Now it will be observed that one and the same reason in terms is here assigned for two widely differing conclusions; and it may therefore well be that the proposition may have two different senses, and be true in one though false in the other. No one in the least degree acquainted with the constitution of the country will doubt that in one sense the House is alone to judge of its own privileges, that in the case of a recognised privilege, the House alone can judge whether it has been infringed, and how the breach is to be punished. This concession, however, will not satisfy the advocates of privilege, nor the exigencies of the defendant's case. The Attorney General contends that the House is alone and exclusively judge of its own privileges, in the sense that it alone is competent to declare their number and extent, and that whatever the House shall resolve to be a privilege is by such resolution conclusively demonstrated to have been so immemorially.

I next observe that the power to make any new privilege has been, as was necessary, distinctly disclaimed; the House, it is said, only acts judicially in declaring the law of parliament. We must however look to the sub-

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stance of things: and, as that cannot be done indirectly which it is unlawful to do directly, if it shall appear that the power claimed is in effect equivalent to that which is disclaimed, a strong presumption at least is raised against the validity of the claim. Now what, in effect, is the right to declare the extent of privilege conclusively but irresponsible and uncontrollable power to make it? At present we know, or we fancy we know, the limits of privilege, in certain cases at least; for example, we have been taught that the House of Commons cannot administer an oath to a witness (*n*): let me suppose the House to resolve to-morrow that it has the power to do so, and that it is a breach of privilege to deny it; if the Attorney General's argument be correct, that power not merely is thenceforth, but from time immemorial has been, inherent in the House; and every judge and lawyer must forget all that he has learned before, and is forbidden to inquire even into the previous acts or declarations of the same branch of the legislature upon the same subject; although the journals of the House might teem with conclusive proof that no such power existed, it would not be lawful for this Court to borrow light from them; it must acquiesce in the new declaration, and deny its relief to any one suffering under it. Yet what would be in effect the result, but that the House would have thus acquired for itself a power which no lawyer could doubt it did not possess before? I have put a case drawn from within the range of those which fall under the admitted province of privilege; but the same reasoning will apply to cases entirely unconnected with it, cases which have really nothing to do with the duties or proceedings of the House. It would be easy to put striking instances of this kind; but they may be summed up at once, and without the least exaggeration, in the remark, that there is nothing dear to us, our property, liberty, lives, or

(*n*) See now stat. 34 & 35 Vict. c. 83.

characters, which, if this proposition be true, is not, by the constitution of the country, placed at the mercy of the resolutions of a single branch of the legislature.

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Three answers, however, are made to such a supposition: 1st, it is said that paramount and irresponsible power must be lodged somewhere, and that it can nowhere be so safely lodged as with the representatives of the people; 2ndly, that it is not seemly to presume nor sound to argue from presumed abuses of power by so august a body; 3rdly, that in truth what has been urged by way of objection with regard to the House of Commons might equally be said in the matter of contempts of this or any other court of judicature.

As to the 1st, I would observe that, by the theory of the advocates for privilege, *they* cannot argue this as a question of power; they limit themselves in terms to jurisdiction; they claim only an absolute jurisdiction; I answer that is in effect uncontrollable power: if they reply by an admission and a justification of that which I object, they must at least abandon their disclaimer of it, and acknowledge that they do in effect contend for the right not merely to declare, but to make privileges. But, if they justify the claim by asserting that absolute and irresponsible power must be lodged somewhere, and that it can nowhere be so safely lodged as with the representatives of the people, I take leave respectfully to dissent from both branches of the proposition.

(1.) As to the first, I will not waste time by examining those extreme cases with regard even to the entire legislature, in which, according to the theory of the constitution, even its so-called omnipotence is limited; cases wisely not specified, nor in terms provided for, because they are beyond the constitution, and, when they unhappily arise resolve society into its original elements. But, if the assertion be applied to any body in the state, or any court for the administration of justice, civil or criminal, there is neither the one nor the other which by

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the constitution claims absolute power in the sense in which it is now claimed for the Commons. Every question which comes before a court of justice must be one of law or fact; and, as to either, the decision may be wrong through error or corruption: but our constitution has been careful, almost to an extreme, in providing the means of correcting it in both cases, and for punishing it in judge or jury, when it can be traced to corruption. It is true that, as to errors in law, there must be some limit to the series of courts of revision; and it is supposable that the court of last resort may persist in the error of the original decision. But even in that extreme case the constitution fails not, for the parliament may then interfere (and has done so in some cases) to reverse and annul the erroneous decision.

(2.) Denying as I do the first branch of the proposition, it is not necessary for me, and would not comport with the profound respect which I feel for the House of Commons, to give my reasons for doubting the second.

But it is said, 2ndly, that the argument is founded on presumed abuse of power by the House of Commons; that such an argument is not sound in reasoning, nor seemly as applied to so august a body. I agree that it is not seemly, and I disclaim the intention of using it; yet, when I am considering merely the antecedent reasonableness of the defendant's argument, I cannot pretend to forget what the journals of the House have been shown to contain, nor to be ignorant that it is of the very nature of irresponsible power, especially in the hands of a large body, to run to excess. I believe, however, that among those who now claim this power are the men who would be the very last to abuse it. But the truth is, that the answer is beside the question; for the cases are put merely to try the truth of a universal proposition: and by the strictest rules of reasoning you may apply even extreme cases to test the truth of such propositions. My opponent in argument asserts that in all cases the House

may declare conclusively that it possesses this or that privilege; I deny the truth of that, because, if true, the House would be able to commit by law this or that monstrous act of tyranny or injustice: he may in return either deny my assertion or admit it; if he deny it, he will soon find that he must abandon his first claim also; if he admit it, then my argument is, that, whether in fact the consequence will happen seldom or often, or it may be never, that cannot be law from which such a consequence *may* in natural course follow.

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To the 3rd answer, I have already given the necessary reply in considering the first. I will only, in addition, point out how wide the distinction is between the declaration of the House of Commons in a matter of privilege, where itself is judge and party, and where the law provides no means of revision in any individual case, and the decision, even erroneous, even corrupt, of a court of justice between contending parties. I do not forget, but reserve for another place, the case of committals for contempts, which will be found, both as regards the House and courts of justice, to fall more properly under a different consideration.

But it is said that this and all other courts of law are inferior in dignity to the House of Commons, and that therefore it is impossible for us to review its decisions. This argument appears to me founded on a misunderstanding of several particulars; first, in what sense it is that this Court is inferior to the House of Commons; next, in what sense the House is a court at all; and, lastly, in what sense we are now assuming to meddle with any of its decisions. Vastly inferior as this Court is to the House of Commons, considered as a body in the state, and amenable as its members may be for ill conduct in their office to its animadversions, and certainly are to its impeachment before the Lords, yet, as a court of law, we know no superior but those courts which may revise our judgments for error; and in this respect there

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is no common term of comparison between this Court and the House. In truth, the House is not a court of law at all, in the sense in which that term can alone be properly applied here; neither originally nor by appeal can it decide a matter in litigation between two parties: it has no means of doing so; it claims no such power; powers of inquiry and of accusation it has, but it decides nothing judicially, except where it is itself a party, in the case of contempts. As to them no question of degree arises between courts; and, in the only sense therefore in which this argument would be of weight, it does not apply. In any other sense the argument is of no force. Considered merely as resolutions or acts, I have yet to learn that this Court is to be restrained by the dignity or the power of any body, however exalted, from fearlessly, though respectfully, examining their reasonableness and justice, where the rights of third persons, in litigation before us, depend upon their validity. But I deny that this inquiry tends to the reversal of any decision of the House; the general resolution and the *res judicanda* are not identical; the House of Commons has never decided upon the fact on which the plaintiff tendered an issue: that argument will be found by-and-by to apply to the cases of committal for contempt, but it has no place in the consideration immediately before me.

Again, it is said that the jurisdiction of the House must be exclusive, because it proceeds, not by the common law, of which alone we are cognisant, but by a different law, the parliamentary law, of which we are wholly ignorant. I cannot think that this argument is entitled to much weight. It is every day's practice with us to decide cases which turn upon the laws of foreign countries, or the laws administered in courts of peculiar jurisdiction in this country. Of these we have no judicial knowledge; but we acquire the necessary knowledge by evidence; and it is not denied that, where in a cause the question of privilege arises incidentally, this Court must take notice of it

and inquire into its existence and extent. What therefore it must do in some cases where the same difficulty exists, there can be no moral impossibility on that account of its doing in all.

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This objection, however, leads me to observe that cases of privilege so called will often arise, where the question will be, not merely whether the privilege does exist, but whether the claim made can be reduced at all under any true definition of privilege. Privilege, if it be anything but the mere declaration of the present will of the body claiming it, must be capable of some general fixed definition, however it may vary in degrees in different bodies. No lawyer, I suppose, now supports the doctrine of Blackstone (n), that the dignity of the Houses, and their independence are in great measure preserved by keeping their privileges indefinite. But of privilege in the general we must be competent to form some opinion, because we have from time to time to deal with our own privileges. Let me suppose, by way of illustration, an extreme case ; the House of Commons resolves that any one wearing a dress of a particular manufacture is guilty of a breach of privilege, and orders the arrest of such person by the constable of the parish. An arrest is made and action brought, to which the order of the House is pleaded as a justification. The Attorney General has said that it is always a question of privilege, when it is a question whether the House has power to order the act complained of to be done ; and that this question arises directly, whenever it appears by the record that the action is for that which the House has ordered to be done. In such a case as the one supposed, the plaintiff's counsel would insist on the distinction between power and privilege ; and no lawyer can seriously doubt that it exists : but the argument confounds them, and forbids us to inquire in any particular case, whether it ranges under the one or the other. I can find no principle which sanctions this.

(n) 1 Com. p. 164.

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After commenting on several of the cases which have been before mentioned, his lordship went on to observe : —Neither have I any difficulty with any of the cases in which the question arises upon anything said or done in the House. In point of reasoning, it needed not the authoritative declaration of the Bill of Rights to protect the freedom of speech, the debates or proceedings in parliament from impeachment or question in any place out of parliament; and that the House should have exclusive jurisdiction to regulate the course of its own proceedings and animadvert upon any conduct there in violation of its rules, or derogation from its dignity, stands upon the clearest grounds of necessity. The argument, therefore, with which we were pressed, that if the defendants were liable to this action, the Speaker who signed the order for printing, and the members who concurred in the resolutions, must be equally liable to be tried, on the ordinary principle of master and servant, has no foundation. It cannot be necessary to dwell on a distinction so well established; on the other hand, no conclusion in favour of the defendants can be drawn from the immunity of the Speaker or the members in respect of anything done by them in the House, which occasioned the publication of the libel complained of, without. The order may be illegal, and therefore no justification to him who acts on it without; and yet the courts of law may be unable to penetrate the walls of the House, and give redress for anything done within; just as the individual who executed an illegal order of the monarch would be responsible, although the constitution would allow of no proceeding against the monarch himself.

And now, having made these limitations clear, I would ask whether, subject to them, there is any reasonable doubt that it has been the practice of the courts to inquire into questions of privilege, a practice, considering all the circumstances, prevailing with remarkable uniformity, and traced from very early periods? It would be impos-

sible for me within any reasonable limits to go through the series of recorded cases; and, after the judgments already pronounced, must be quite unnecessary; although to specify only a few may seem as if they alone were relied on. The case of *Donne v. Walsh*, 12 Edw. 4 (o) and of *Ryver v. Cosyn* in the same year and same book (p), are important, as showing that at that early period, when the *supersedeas* of a cause was to depend on the extent of the parliamentary privilege, the inquiry was left to the judges of the court in which the cause itself was pending. In both instances, the Barons of the Exchequer take to counsel the judges of either bench, and, finding *quod non habetur nec unquam habebatur talis consuetudo* as that relied on for the *supersedeas*, disallow it, and order the defendant to answer to the declaration.

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Ferrers's Case (q) in the reign of Henry VIII. is noticed by Mr. Hatsell, as being the first instance in which the House of Commons took upon themselves to vindicate their privilege of freedom from arrest (r); and, when that case is read at length, one cannot but observe indications of their proceeding, as if in the exercise of an untried power, with uncertain and somewhat inconsistent steps. The House is inflamed by the imprisonment and detention of their member, and the violent resistance to the serjeant; but what is their first step? They all retire to the upper House; the Speaker states their grievance, the Chancellor and the Judges consider the matter, and "judging the contempt to be very great," refer "the punishment thereof to the order of the Commons' House." Then, the member being relieved, and the offenders against privilege having submitted and been punished, an Act of Parliament passes, after long debate, touching the member's debt (s); the king comes to the parliament, and

(o) 1 Hats. Pr. 41.

(p) 1 *Id.* 42.

(q) 1 *Id.* 53.

(r) See Prynne, Reg. Part 4, 858.

(s) To prevent the creditor from ultimately losing his demand.

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descendants in large terms upon their privileges, founding himself on the information of his learned counsel; and the whole is concluded by the lord chief justice "very gravely" declaring "his opinion, confirming by divers reasons all that the king had said." Dyer, who, in an *Anonymous Case* (t) states the law as to one of the privileges of parliament, refers to this case, saying, "and so it was held by the sages of the law in the case of one Ferrers in the time of Henry VIII."

Cases and language such as the preceding seem to me to furnish the key to the true meaning of the expressions to be found in *Thorp's Case* (u), and the 4 Inst. (x), on which reliance has been placed by the defendants.

II. The less important question raised by the plea, but still a cardinal one to the decision of the case, remains to be considered as shortly as I can. Has the House of Commons the privilege of publishing and selling indiscriminately to the public whatever it orders to be printed for the use of the members? Or, conceding the resolution and order just stated to be identical in effect with the resolution of uncertain date stated at the end of the plea (which yet, considering their language, is a wide concession to make), is the power of publishing such of its votes, reports, and proceedings, as it shall deem necessary or conducive to the public interest, an essential incident to the constitutional functions of the Commons' House of Parliament?

The burthen of proof is on those who assert it; and, for the purposes of this cause, the proof must go to the whole of the proposition: its truth as to the votes, or even as to some of its proceedings, will not suffice. Now we have been referred to the report of the committee on the publication of printed papers, and with some emphasis we have been informed of the names of the individual

(t) Moore, 57. See Prynne, Reg. Part 4, 780, 861; 1 Hats. Pr. 58.

(u) 1 Hats. Pr. 28.
(x) 4 Inst. 15.

members. The industry displayed in the former, and the well known learning and ability of the latter, are such, that we may safely say, if the proposition has not been demonstrated, it cannot be.

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Si Pergama dextrâ
Defendi possent, etiam hæc defensa fuissent (y).

One thing is remarkable in this controversy. The privileges of parliament at different periods have engaged largely the attention of political writers, and parliament has never wanted zealous asserters to enumerate them; and no one can doubt of the extreme importance of this branch of them, if it had ever existed. I look to the report for authorities of this class, and I find it a perfect blank. If anything could be added to that report, the argument for the defendants, it may be safely asserted, would have supplied it; that is equally a blank on this head. Nor am I able to supply any authority to this effect. It is difficult to explain this in any manner consistently with its being a recognised privilege. General acquiescence might explain why there was no case to be found in support of it; but for the very same reason one would have expected to have found it enumerated in some or all of the text writers who have had to deal with the subject of privilege.

But, if not to be found in such works, nor evidenced by any resolution of the House prior to that of 1837, does it stand more securely on the testimony of the journals and proceedings of the House? It cannot be denied that the journals present evidence of the exercise of the right of publication: the question is, whether, all things considered, and specially the nature of the right on the one hand, and the imperfect state of the early journals on the other, it is sufficient in reason to establish its existence. For about the first century of the journals, from 1547 to

(y) *Virg. Æn.*, lib. ii. 291, 292.

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1641, nothing appears on the subject; but the time and occasion of the commencement of the precedents relied on, and the early precedents themselves, are far more unfavourable to the right than the previous want of any. The time is 1641; the occasion the unhappy difference between the Sovereign and the House: the precedents themselves direct acts moving in and towards the Great Rebellion. Mr. Hatsell, closing his first part (z), says, "If I shall ever have leisure or inclination to continue this work, I shall think myself obliged to pass over everything that occurred" "after this unhappy day" (the entrance of the King into the House), "and shall collect only such precedents as are to be met with" in the two parliaments of 1640, till the "4th of January, 1641, and then proceed directly to the Restoration." And I cannot but think that this part of the defendants' case would have stood better if the same discretion had guided the industry of those who collected their precedents, and if no reliance had been placed on these violent and irregular proceedings.

Passing from this inauspicious opening to the year 1660, and thence to the year 1835, I do not doubt that in a great many instances the House of Commons is shown to have printed and published votes, reports, and proceedings; the votes indeed with considerable regularity; but, as to the first of these, the right to publish is undisputed, and stands on a ground which leaves this question untouched. The term "proceedings" is so vague that I am unwilling to pronounce any opinion upon the right as to them generally; but no doubt there are many things, fairly reducible under that term, which the House would have the right to publish: and, as to their reports, a large proportion of them would contain nothing criminal of individuals, so as to raise no question upon the right. Now, when the necessary deductions are made

in respect of all these considerations, and when, besides, we allow for the reluctance which individuals would have to litigation with so formidable an adversary as the House, even where the criminating matter in a report was false, and that it would be doubted where the matter was true, which in many instances it must in reason be taken to have been, the *residuum* of the evidence which may be fairly considered to support the right claimed is so small as entirely to fail in making it out. We have been obliged in this case to refer to what looks like evidence in fact, in order to ascertain the law: and evidence naturally bears with a different weight on different minds. I speak of my own impression; and, considering it merely as a question of evidence, I frankly avow that what has here been collected gives the claim to my mind the character much more of usurpation than lawful privilege.

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But it may be said that necessity, or at least a strong expediency, proves the existence of the privilege; for they are the foundation of all privilege.

These may be essential to privilege; but I must take leave to deny that alone they can constitute it. The House of Commons is sometimes called the grand inquest of the nation; and to the discharge of its duty as such, who can doubt that the power to examine witnesses upon oath would be most conducive? To the perfect discharge of that duty who can doubt that in early times it was thought essential? Yet there is nothing clearer than that the House has not that power (*a*), and cannot by its own resolutions acquire it. The author of Junius's Letters, I think, lays down a safer rule: "To establish a claim of privilege in either House, and to distinguish original right from usurpation, it must appear that it is indispensably necessary for the performance of the duty they are employed in, and also that it has been uniformly allowed" (*b*).

(*a*) See now stat. 34 & 35 Vict. c. 83.

(*b*) Letter 44.

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Were I therefore to concede the necessity, or the strong expedience, one half only of the defendants' case would be made out; the objector would still appeal to the defective evidence of allowance, and the rule would hold—*Bonum ex causâ integrâ, malum ex aliquâ parte*. But I do not feel that I can make that concession. I will not put this upon the ground of inconsistency in the urging this argument for a body whose most undoubted and exercised privilege it is to exclude the public at pleasure from their debates; but, recollecting the great inconvenience of all injustice, the great advantage of maintaining the principle that even public benefits are not to be purchased by a violation of the sacred rights of individuals, recollecting how nearly all, if not all, the benefit of publicity may be secured, even when it is confined to matter not criminal, I assert with the greatest confidence that the balance even of public expedience is in favour of a right of publication restricted by the limits of the common law. What advantage derived from publicity can be equal to the maintenance of the principle, that even to the representatives of the people, the most powerful body in the nation, the calumny of individuals is forbidden? What benefit can countervail the evil of a general understanding that any man's character is at the mercy of that body, and that by the law, not merely by the force of overbearing power, but by the rule of English law, for the sake of public expedience, he may be slandered without redress? I desire to avoid language that may have the semblance of offence: but I soberly ask the warmest advocate for this extended privilege, whether any benefit in a land, all the institutions of which seek the genial sunshine of public opinion and must languish without it, can make up for the injury resulting from this, that it should be capable of being said with truth, the House of Commons has become a trader in books, and claims, as privilege, a legal monopoly in slander.

If then I try this claim by the authority of text writers,

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by the evidence of precedents, by the test of expedience or necessity, it seems to me in each and all of these to be signally wanting. I am therefore of opinion that the plaintiff is entitled to our judgment. I could wish that I had had leisure to express my reasons more concisely, and more clearly. I have examined the question, however, with an anxiety proportionate to its importance, and with a deep sense of the responsibility attaching to the decision; but I cannot say that I entertain the least doubt of its correctness.

We have been warned of the danger of a pursuit after popularity; advice no doubt tendered in a respectful and friendly spirit: advice most useful where needed. I trust that nothing we have said or done can fairly lay us open to the imputation of needing it. For myself I am afraid to quote a passage from the eloquent appeal of a great predecessor (*b*) of my Lord, lest any one should suppose me weak enough to be thinking of a comparison with Lord Mansfield; but I *feel* the distinction between the popular favour that follows an honest course, and that which is followed after.

To speak of a contempt of the House, if "we assume to decide this question inconsistently with its determination," argues what I should call, if the language had not been used by those whom I am bound to revere, a strange obliquity of understanding. The cause is before us; we are sworn to decide it according to our notions of the law; we do not bring it here; and, being here, a necessity is laid upon us to deliver judgment; that judgment we can receive at the dictation of no power: we may decide the cause erroneously; but we *cannot* be guilty of any contempt in deciding it according to our consciences.

The privileges of the House are my own privileges, the privileges of every citizen in the land. I tender them as dearly as any member possibly can: and, so far from con-

(*b*) Lord Mansfield in *Rex v. Wilkes*, 4 Burr. 2562; *ante*, p. 797.

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sidering the judgment we pronounce as invading them, I think that by setting them on the foundation of reason, and limiting them by the fences of the law, we do all that in us lies to secure them from invasion, and root them in the affections of the people.

Subsequent
proceedings.

After the decision in the above case, the plaintiff brought another action in the Court of Queen's Bench, and recovered judgment (A.D. 1839) against the same defendants. A writ of inquiry was executed thereupon, and the damages assessed at £600. A *fi. fa.* was issued, and the sheriff (c) returned that the goods remained in his hands for want of buyers. A *venditioni exponas* was then sued out, to which the sheriff returned that he had the money in court. A rule was then served upon the sheriff, calling on him to show cause why this money should not be paid to the plaintiff, and to this rule he showed cause by producing in the first place an order of the Insolvent Court which had been served on him, setting forth that the plaintiff was insolvent, and directing the sheriff to hold the money in hand, till the court should make further order concerning the same.

Resolutions
of House of
Commons.

Further, on behalf of the sheriff it was stated that on January 21, 1840, the House of Commons had passed the following Resolutions (d) :—

“ That it appears to this House that execution in the cause of *Stockdale v. Hansard* (e) has been levied to the amount of £640 by the sale of the property of Messrs. Hansard, in contempt of the privileges of this House, and that such money now remains in the hands of the sheriff of Middlesex.

“ That the said sheriff be ordered to refund the said amount forthwith to Messrs. Hansard.”

(c) Messrs. Evans and Wheelton,
Sheriffs of London and Sheriff of
Middlesex.

(d) 95 Comm. Journ. 16.
(e) *Ubi supra.*

And that the sheriffs were guilty of a contempt (f): in pursuance whereof they had been committed, and still remained in custody.

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The Court, nevertheless, made the rule absolute, commanding the sheriff to pay over the money which had been levied to the judgment creditor.

Afterwards, in January, 1840, a rule *nisi* was obtained for an attachment against the sheriff for non-payment of the money. And, in answer, the sheriff made affidavit giving a history of the proceedings above briefly stated, and also of those relating to the *habeas corpus* sued out by the sheriff, and the decision of the Court as subsequently narrated (g), remanding them to the custody of the serjeant-at-arms. They added, that they had acted *bonâ fide*, and to the best of their judgment, as officers of the Court, in execution of its process; and that they had been, and were, kept in prison in order that they might be compelled to pay back the money to the defendants instead of paying it to the plaintiff according to the writs, and the orders and rules of the Court. That they had no power, by reason of their imprisonment, to go and procure the money, to pay it over in obedience to the rule of court, or actually to pay it to the plaintiff, and could obey the rule only by desiring the under-sheriffs, or other officers, to pay it, whom they believed they should thereby expose to imprisonment. And they submitted to the Court, whether they ought to place the under-sheriffs or others in peril, unless the Court could protect them in obedience to itself.

Rule for attachment.

The Court, however, made the rule for an attachment against the sheriff absolute.

—made absolute.

Lord Denman, C. J., observing, “It is suggested that, under these painful circumstances, we cannot truly say that a contempt has been committed by not paying the money. I say, without any hesitation, that, if this were a

Judgment.

(f) *Post*, p. 961. (g) See *Case of the Sheriff of Middlesex*, *post*, p. 961.

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mere penal proceeding, I should think it an act of the utmost injustice to inflict anything like punishment on these gentlemen: their conduct does them honour; and all persons are bound to brave such consequences as may be brought upon them by obedience to the law of the land. But the question is, whether the plaintiff has not a right to call upon the sheriff to pay over to him the money which that officer holds to his use. He has as much right to that money as any member of either House of Parliament has to his estate. We, having put the law in motion, are bound to enforce it for him: and there is, unfortunately, no other mode of doing so than the proceeding now suggested. It is said that the sheriff may be hindered from performing the duty by physical force. Without casting any reproach upon these gentlemen, and thinking it quite natural that they should wish to have the direction of this Court in every step of their proceedings, yet, if that support could be purchased by a delay which was so far a postponement of the discharge of their duty, I must still say that the individual for whom they are trustees is not to suffer by their taking a prudential course in that respect. It is suggested, now, that the law cannot be carried into effect without exposing others to the inflictions to which these gentlemen have been subjected. I trust that will not be the case. But, whatever the consequences may be, this is a mere civil process to enable a party to a cause tried in this Court to obtain his rights; the Court has no discretionary power."

CASE OF THE SHERIFF OF MIDDLESEX, 11 Ad. & E. 273.

(3 Vict. A.D. 1840.)

POWER OF THE HOUSE OF COMMONS TO COMMIT FOR
CONTEMPT.

The House of Commons has the power to commit for contempt. A Court of Law will not release persons so committed, because the warrant of commitment does not specify the grounds on which they had been adjudged guilty of contempt, nor can the Court in such a case inquire into the merits of the commitment.

On January 21, 1840, the House of Commons resolved (*h*) that the execution, mentioned at page 958, had been levied in contempt of their privileges, and further resolved, "that William Evans, Esq., and John Wheelton, Esq., Sheriff of Middlesex, having been guilty of contempt and breach of the privileges of this House, be committed to the custody of the serjeant-at-arms attending this House, and that Mr. Speaker do issue his warrant accordingly."

Whereupon the Speaker issued the following warrant, signed by himself, and directed to the serjeant-at-arms attending the House of Commons :—

"Whereas the House of Commons have this day resolved that W. E. and J. W., Esqs., Sheriff of Middlesex, having been guilty of a contempt and breach of the privileges of this House, be committed to the custody of the serjeant-at-arms attending this House:

Speaker's
warrant.

"These are therefore to require you to take into your custody the bodies of the said W. E. and J. W., and them safely to keep during the pleasure of this House; for which this shall be your sufficient warrant."

By virtue of the foregoing warrant the sheriffs were

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Return to
habeas
corpus.

taken into custody, and on January 23rd a writ of *habeas corpus* was moved for on their behalf in the Court of Queen's Bench, in obedience to which the serjeant-at-arms made the following return:—"I do hereby certify and return, in obedience to the said writ, that, before the coming of the said writ to me, to wit on the 21st day of January, A.D. 1840, I did take into my custody, and have thenceforth always hitherto detained in my custody, and still do detain in my custody, the said W. E. and J. W., Esqs., in the said writ named, under and by virtue of a certain warrant under the hand of the Right Hon. C. S. Lefevre, Speaker of the said House of Commons, which said warrant is as follows:—

[Here followed a copy of the warrant, *ante*.]

"And I do hereby further certify and return, in obedience to the said writ, that the above is the cause of my taking and detaining in my custody, as in the said writ mentioned, the said W. E. and J. W., Esqs., the bodies of which said W. E. and J. W., Esqs., I have here ready as in and by the said writ I am commanded."

Judgment. In support of the motion to discharge the sheriffs upon the return above set out to the writ of *habeas corpus*, various arguments were urged, the purport of which will sufficiently appear from the following judgment of Lord Denman, C.J.,—I think it necessary to declare that the judgment delivered by this Court in *Stockdale v. Hansard* (i) appears to me in all respects correct. The Court decided there that there was no power in this country above being questioned by law. The House of Commons there attempted to place its privilege on the footing of an unquestionable and unlimited power. It was argued, against that claim, that the *dicta* of learned judges by which it was supported had in many cases been hastily thrown out, and were encountered by others of a contrary tendency from judges not less eminent, and by precedents.

(i) *Ante*, p. 875.

I endeavoured to establish that the claim advanced in that case tended to a despotic power which could not be recognised or exist in this country, and that the privilege of publication, as there asserted, had no legal foundation. To all these positions I, on further consideration, adhere; all of them I believe in my conscience to be true. And if this were not so, it is strange that the case should not have been brought before the other ten judges by writ of error. The House could have suffered no loss of dignity by submitting to them the question which it had already laid before us. In the last resort, a further appeal might have been made to the House of Lords. The efficacy of such an appeal is not to be disputed merely because persons may choose to cast reflections on that body in which, by law, the ultimate decision is vested. That House, too, had an interest (if such motives were supposed to prevail) in upholding a privilege which was claimed for them as well as for the House of Commons. Besides, if our judgment and that of the Exchequer Chamber had been adverse to the plaintiff, it is probable that he would not have acquiesced; and then resort must have been had to the jurisdiction of the House of Lords. In deciding the former case, we looked to the law as our only safe guide, discarding all considerations of supposed expediency; and, under the same guidance, we examine the question now before us.

The only question upon the present return is, whether the commitment is sustained by a legal warrant? Three objections have been taken to the warrant, in point of form merely. 1st, that the words "having been guilty" are no direct adjudication that a contempt has been committed. But in a late case (*k*), where the participle was used in this manner, we considered it as a direct allegation; and it would be childish to suppose that, in a

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(*k*) *Reg. v. Lewis*, 8 Ad. & E. 881. 4 Ad. & E. 111; *R. v. Inhab. of Milverton*, 5 Ad. & E. 841.

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document expressed as this is, the grammatical form objected to could alter the effect. 2ndly, it is said that the warrant states only a resolution of the House that a contempt has been committed, but no order given by them to the Speaker. This appears to me unnecessary. We must notice that the Speaker is the officer of the House, and must take it that, when they adjudged a contempt to have been committed, he had full authority from that moment. 3rdly, it is objected that the words "this House," in the latter part of the warrant, are not connected by any reference with the House of Commons before mentioned. But no other house is mentioned in the warrant; and the serjeant-at-arms certifies in his return that the warrant is under the hand of the Speaker. I cannot for a moment so trifle with a clear and intelligible document as to say that the House of Commons is not meant. It was also observed that the warrant does not allege a contempt of the House, but "a contempt and breach of the privileges of this House." But the same form was used in the cases of Sir Francis Burdett (*l*) and Mr. Hobhouse (*m*). The great objection remains behind, that the facts which constitute the alleged contempt are not shewn by the warrant. It may be admitted that words containing this kind of statement have appeared in most of the former cases; indeed there are few in which they have not.

[His lordship here commented on the cases *infra* (*n*), and proceeded.]

We must presume that what any court, much more what either house of parliament, acting on great legal authority, takes upon it to pronounce a contempt, is so.

(*l*) 14 East, 1.

(*m*) 2 Chit. 207.

(*n*) *Jay v. Topham*, 12 St. Tr. 821; *Brass Crosby's Case*, 2 W. Bla. 754; S. C. 3 Wils. 188; *Burdett v. Abbot*, 14 East, 1; *R. v. Hobhouse*,

2 Chit. 207; *Lord Shaftesbury's Case*, 6 St. Tr. 1269; *Murray's Case*, 1 Wils. 299; *Reg. v. Paty*, ante, p. 862; *Stockdale v. Hansard*, ante, p. 875.

It was urged that, this not being a criminal matter, the Court was bound, by statute (o), to inquire into the case on affidavit; but I think the provision cited is not applicable. On the motion for a *habeas corpus*, there must be an affidavit from the party applying; but the return, if it discloses a sufficient answer, puts an end to the case: and I think the production of a good warrant is a sufficient answer, seeing that we cannot go into the question of contempt on affidavit, nor discuss the motives which may be alleged. Indeed (as the Courts have said in some of the cases), it would be unseemly to suspect that a body acting under such sanctions as a house of parliament, would, in making its warrant, suppress facts which, if discussed, might entitle the person committed to his liberty. If they ever did so act, I am persuaded that, on further consideration, they would repudiate such a course of proceeding. What injustice might not have been committed by the ordinary courts in past times, if such a course had been recognised! as, for instance, if the Recorder of London, in *Bushell's Case* (p), had, in the warrant of commitment, suppressed the fact that the jurymen were imprisoned for returning a verdict of acquittal. I am certain that such will never become the practice of any body of men amenable to public opinion.

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MIDDLESEX.

Judgment
of Lord
Denman,
C. J.

In the present case, I am obliged to say that I find no authority under which we are entitled to discharge these gentlemen from their imprisonment.

The rest of the Court concurring, the sheriffs were remanded.

Consequent on the proceedings above narrated, an Act of Parliament (q) was passed, which, after reciting that "it is essential to the due and effectual exercise and discharge of the functions and duties of parliament, and

3 & 4 Vict.
c. 9.

(o) 56 Geo. 3, c. 100, s. 3.

(q) 3 & 4 Vict. c. 9.

(p) *Ante*, p. 115.

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SHERIFF OF
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3 & 4 Vict.
c. 9.

to the promotion of wise legislation, that no obstructions or impediments should exist to the publication of such of the reports, papers, votes, or proceedings of either House of Parliament as such House of Parliament may deem fit or necessary to be published: And whereas obstructions or impediments to such publication have arisen, and hereafter may arise, by means of civil or criminal proceedings being taken against persons employed by or acting under the authority of the Houses of Parliament, or one of them, in the publication of such reports, papers, votes, or proceedings; by reason and for remedy whereof it is expedient that more speedy protection should be afforded to all persons acting under the authority aforesaid, and that all such civil or criminal proceedings should be summarily put an end to and determined in manner hereinafter mentioned: "enacted—

I. "That it shall and may be lawful for any person who is or shall be, a defendant in any civil or criminal proceeding commenced or prosecuted, for or on account or in respect of the publication of any such report, paper, votes, or proceedings by such person, or his servant, by or under the authority of either House of Parliament, to bring before the Court in which such proceeding shall have been or shall be so commenced or prosecuted, or before any judge of the same (if one of the superior courts at Westminster), first giving twenty-four hours' notice of his intention so to do to the prosecutor or plaintiff in such proceeding, a certificate under the hand of the Lord High Chancellor of Great Britain, or the Lord Keeper of the Great Seal, or of the Speaker of the House of Lords, for the time being, or of the Clerk of the Parliaments, or of the Speaker of the House of Commons, or of the Clerk of the same House, stating that the report, &c., in respect whereof such proceeding shall have been commenced or prosecuted, was published by such person or by his servant, by order or under the authority of the House of Lords or of the House of

Commons, together with an affidavit verifying such certificate; and such court or judge shall thereupon immediately stay such proceeding, and the same, and every writ or process issued therein, shall be and shall be deemed and taken to be finally put an end to, determined, and superseded by virtue of this Act."

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3 & 4 Vict.
c. 9.

II. "That in case of any civil or criminal proceeding hereafter to be commenced or prosecuted for or on account or in respect of the publication of any copy of such report, &c., it shall be lawful for the defendant at any stage of the proceedings to lay before the Court or judge such report, &c., and such copy, with an affidavit verifying such report, &c., and the correctness of such copy; and the Court or judge shall immediately stay such proceeding, and the same, and every writ or process issued therein, shall be and shall be deemed and taken to be finally put an end to, determined, and superseded by virtue of this Act."

III. "That it shall be lawful in any proceeding to be commenced or prosecuted for printing any extract from or abstract of such report, &c., to give in evidence under the general issue such report, &c., and to show that such extract or abstract was published *bonâ fide* and without malice; and if such shall be the opinion of the jury, a verdict of Not Guilty shall be entered for the defendant or defendants."

IV. "That nothing herein contained shall be deemed or taken, or held or construed, directly or indirectly, by implication or otherwise, to affect the privileges of parliament in any manner whatsoever" (r).

(r) The above Act is "imperative," and in pursuance of it the proceedings in an action of *Stockdale v. Hansard*, 11 Ad. & E. 297, were afterwards stayed by the Court of Queen's Bench. So in an action of *Harlow v. Hansard*, see May, Parl. Prac. 185 (n); and in the case of *Houghton v.*

Plimssoll, tried at Liverpool Spring Assizes, 1874, Amphlett, B., held that the Report of a Royal Commission presented to parliament in a printed form and adopted by parliament, and ordered to be distributed came within the Act (*ib.*).

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STOCKDALE
P.
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ETC.
—

*Burdett v.
Abbot.*

Concerning the *Lex et consuetudo Parliamenti*, which forms a constituent part of the law of the land in its large and extended sense, the authorities yielded by reports and treatises have in the preceding judgments been well nigh exhausted. Some further reference may, however, properly be made to the celebrated case of *Burdett v. Abbot* (s), and to a few more recent cases, touching the privileges of parliament. *Burdett v. Abbot* was an action of trespass brought by the late Sir Francis Burdett against the Speaker of the House of Commons for breaking and entering the plaintiff's house, the outer door of it being shut (t)—seizing the plaintiff—conveying him under military escort to the Tower of London—and there delivering him into the custody of the Lieutenant of the Tower, and confining him in such custody. The defendant by special plea justified this alleged trespass in virtue of a resolution of the House of Commons, that the plaintiff had been guilty of publishing a libel upon the House, and so of breach of privilege—and of an order of the House that the plaintiff should be committed to the Tower, and that the Speaker should issue his warrant against him accordingly. The plea averred that the trespass complained of in the declaration had been committed by the defendant as Speaker in obeying the directions of the House; and the main questions raised by demurrer to this plea were: Has the House of Commons any authority by law to commit in cases of contempt—as for a breach of privilege? Would a commitment on such ground by this tribunal be in violation of the words of

(s) 14 East, 1; S. C., 4 Taunt. 401; 5 Dow, 165; *et vide* *Burdett v. Colman*, 14 East, 163.

(t) As to the invalidity of this ob-

jection in cases of contempt, see *Harvey v. Harvey*, 26 Ch. D. 644; and cases there cited.

Magna Carta—that no man shall be imprisoned but by the lawful judgment of his peers, or by the law of the land (*u*)—would such a commitment be in violation of the stat. 28 Edw. 3. c. 3, enacting,—“that no man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death without being brought in to answer by due process of the law.” The luminous judgment of Lord Ellenborough, C.J., in *Burdett v. Abbot*, is specially worthy of attention. The privileges, he says, which belong to parliament in the aggregate, composed of Lords and Commons, seem at all times to have been, and necessarily must be, inherent in them, independent of any precedent. These privileges exist, if at all, by prescription, in virtue of a long course of practice or user, going back to the time when the two branches of the legislature met in one chamber (*x*), and there with due solemnity discussed the commonwealth’s affairs—then, as now, most obviously was it necessary that members of this great body should have complete personal security so that they might freely meet without let or hindrance for the purpose of discharging their important functions—then, as now, was it necessary that this great body should have efficient means of self-protection—of protection, not merely against acts of wrong done to individual members of the House, but against injuries or affronts offered to them in the aggregate, which might prevent or impede the full and effectual performance of their parliamentary functions. This is an essential right necessarily inherent in the supreme legislature of the kingdom, and of course as necessarily inherent in the parliament assembled in two houses as in one. If this

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(*u*) Chap. 29.

(*x*) *Ante*, p. 882.

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view be correct, it follows that either House has power not merely to remove actual impediments to its proceedings, but likewise to protect itself from insult and indignity, wherever offered, by punishing those who offer it (*y*).

In the above case, which was affirmed in error (*z*), no conflict occurred between the Courts of Common Law and the Court of Parliament, inasmuch as the particular privilege of the House of Commons, there questioned and sought to be denied, was notorious and well defined. Indeed, when the case came before the highest tribunal (*a*), Lord Erskine with emphasis observed, that the House of Commons ought to be jealous of such privileges as are necessary for its protection—that “these privileges are part of the law of the land”—that “it is the law which protects the just privileges of the House of Commons as well as the rights of the subject.”

Howard v.
Gossett.

The next case throwing light on the inquiry before us, *Howard v. Gossett* (*b*), was an action of trespass for assault and false imprisonment, to which the defendant pleaded in substance as follows :—That a parliament was sitting, and that matters were under discussion in the House of Commons, concerning which the House considered it necessary that plaintiff should be examined at their bar ; that, for the purpose of procuring his attendance to be there examined, it was ordered by the House, in pursuance of and according to the ancient usages and privileges of the House, and the law and custom of parliament, that the plaintiff should attend the said House forthwith, of which he had notice : that he contemptuously refused, and absented himself, and thereupon, and in order to compel the

(*y*) Citing *Reg. v. Paty*, *ante*, p. 862.

(*a*) 5 Dow, 165, 200—1.

(*b*) 10 Q. B. 359.

(*z*) 4 Taunt. 401.

plaintiff's attendance at the bar for the purpose aforesaid, it was ordered by the House that plaintiff should be sent for and brought before the House in custody of the serjeant-at-arms, and that the Speaker should issue his warrant accordingly; whereupon the Speaker, in pursuance of the said order, by his warrant in that behalf duly made, after reciting that the House of Commons had, that day, ordered that the plaintiff should be sent for in the custody of the serjeant-at-arms attending the said House, did require and authorise the serjeant-at-arms then attending the said House of Commons to take into custody the body of the plaintiff. The defendant further averred that the defendant then was the serjeant-at-arms of the House of Commons, and that the Speaker duly delivered the warrant to him to be executed; by virtue and in execution of which the defendant, as such serjeant-at-arms, gently, and without unnecessary violence (*c*), did commit the alleged trespasses.

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Upon demurrer to the defendant's pleas in justification, the substance of which is above set forth, the Court of Queen's Bench gave judgment for the plaintiff (*d*), but this judgment was reversed by the Court of Exchequer Chamber on writ of error (*e*). The grounds of this important judgment were as follows:—That the privileges of the House involved in the inquiry before the Court were indisputable, because, “1st. That House, which forms the Great Inquest of the nation (*f*) has a power to institute inquiries, and to order the attendance of witnesses, and in case of disobedience bring them in custody to the bar for the purpose of examination; and 2ndly. If

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in Error.

(*c*) See *Burdett v. Colman*, 14 East, 163; *Howard v. Gossett*, 1 Car. & M. 380.

(*d*) *Howard v. Gossett*, 10 Q. B.

359.

(*e*) *Gossett v. Howard*, 10 Q. B. 411.

(*f*) 4 Inst. 11.

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there be a charge of contempt and breach of privilege, and an order for the person charged to attend and answer it, and a wilful disobedience of that order, the House has undoubtedly the power to cause the person charged to be taken into custody, and to be brought to the bar to answer the charge; and further the House, and that alone, is the proper judge when these powers, or either of them, are to be exercised."

The question, continued the Court, therefore turns upon the form of the warrant alone. If it be good, and if it authorised all that is alleged to have been done by virtue of it, the defendant was justified; if it were bad, or if it did not authorise all that the defendant did, he was not justified. The answer to the question as to the validity of the warrant depends mainly upon a preliminary point—on what principle is the instrument to be construed? Is it to be examined with the strictness with which we look at the warrants of magistrates, or others acting by special statutory authority, and out of the course of the common law? Or is it to be regarded as the mandate or writ of a superior court acting according to the course of the common law? If this had been the case of a magistrate acting under some statute which gave him a special authority to take a man into custody, under the circumstances stated on the pleadings, a warrant in the form *sub judice* would have been void, those circumstances not appearing upon the face of it, "for in the case of special authorities given by statute to justices or others acting out of the ordinary course of the common law, the instruments by which they act, whether warrants to arrest, commitments or orders, or convictions, or inquisitions, ought, according to the course of decisions, to show their authority on the face of them by direct averment or reasonable

intendment. Not so the process of superior courts acting by the authority of the common law." In *Peacock v. Bell* (g) the rule for jurisdiction is thus stated, "nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so." "Nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged." In like manner it is presumed with respect to such writs as are actually issued by superior Courts, that they are issued duly, and in a case in which they have jurisdiction, unless the contrary appears on the face of them, but writs issued by a superior court not appearing to be out of the scope of their jurisdiction are valid, and of themselves, without any further allegation, afford protection to all officers and others in their aid acting under them, for the officers ought not to examine the judicial act of the Court whose servants they are, nor exercise their judgment touching the validity of the process in point of law, but are bound to execute it, and are therefore protected by it (h). At least *as much* respect is to be shown, and as much authority to be attributed to mandates of the House, as to those of the highest courts in the country, and if the officers of the ordinary courts are bound to obey the process delivered to them, and are therefore protected by it, the officer of the House of Commons is as much bound, and equally protected. The possibility of abuse which may be urged as an objection to the power of either House to issue its mandate, in the form *ante* (i), is no valid argument against its existence. A similar argument might apply equally to all the superior

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(g) 1 Saund. 74.

(h) Citing *Turner v. Felgate*, 1

Lev. 95; *Cotes v. Michell*, 3 Lev. 20.

(i) P. 971.

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courts. In case of an improper exercise of the power of attachment by a court of law or equity, or by either branch of the High Court of Parliament, there can be no appeal, the only remedy is by application to the sense of justice of each Court, and it would be improper to suppose that any one of them would be more likely to abuse the power, or less likely to grant redress than another.

The Court of Exchequer Chamber accordingly, in *Gossett v. Howard*, held that the trespasses alleged against the defendant were justified by the warrant of the Speaker, issued in pursuance of the order of the House of Commons.

*Lines v.
Russell.*

The case of *Lines v. Russell* may here be noticed. The plaintiff in that case having appeared as a witness before an election committee of the House of Commons, and, having in their opinion been guilty of prevarication (*j*), was committed to the custody of the serjeant-at-arms by virtue of the following warrant:—"Whereas a select committee appointed to try and determine the merits of the petition complaining of an undue election and return for the borough of St. Alban's, have this day resolved that William Lines, of the Borough of St. Alban's, having been guilty of prevarication and misbehaviour before the said committee, be committed to the custody of the serjeant-at-arms attending this House. Now, these presents are therefore to require you (the serjeant-at-arms) to take into your custody the body of the said Lines, and to keep him in such custody until twelve of the clock on Tuesday next."

Lines, having been taken into custody, afterwards

(*j*) The 83rd section of "The Election Petitions Act, 1848" (11 & 12 Vict. c. 98, now repealed), enacted that if any witness before an election committee should "give false evi-

dence, or prevaricate, or otherwise misbehave, in giving or refusing to give evidence, the chairman, by their direction" might commit him for a limited time.

brought an action of trespass against Lord Charles Russell, the serjeant-at-arms, who on Feb. 19, 1852, acquainted the House that he had been served with a writ and declaration. The House resolved that their serjeant-at-arms should have leave to plead and defend the action, which he accordingly did. At the trial it was contended that the warrant was invalid, as it did not expressly state that Lines was a witness (*k*), nor that he had prevaricated in giving evidence; and it was also contended that it ought to be judged, not as a warrant issued by the House of Commons, but as one issued by a tribunal of inferior jurisdiction created by Act of Parliament. Pollock, C. B., however, after consulting with other judges, held that the document before him was to be construed as a warrant of the highest court in the country, and not to be criticised as that of a court of inferior jurisdiction, and therefore directed a verdict for the defendant. A bill of exceptions was tendered to this ruling, but waived, and a rule *nisi* obtained for a new trial on the ground of misdirection, which, however, was afterwards discharged on a point of pleading, without any decision being given on the question raised upon the warrant (*l*).

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The last occasion of importance upon which a court of justice has had to consider the privileges of either House of Parliament was in the recent case of *Bradlaugh v. Gossett* (*m*). The plaintiff in that case having been duly elected and returned as member for the borough of Northampton, thereupon in May, 1883,

*Bradlaugh
v. Gossett.*

(*k*) A witness before a committee of the House of Commons is not liable to an action for slander spoken in the course of his evidence. *Goffin v. Donnelly*, 6 Q. B. D. 307; 50 L. J., Q. B. 303.

(*l*) May, Parl. Prac. 9th ed., pp. 81 and 189; 107 Comm. Journ. 64, 66, 68; 19 L. T. 364; 20 *Id.* 54, 83.

(*m*) 12 Q. B. D. 271; 53 L. J., Q. B. 209.

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required the Speaker to call him to the table of the House of Commons for the purpose of taking the oath as required by the Parliamentary Oaths Act, 1866 (*n*). For reasons which were not before the Court (*o*), the Speaker refused to do this; and the House of Commons on the 9th of July following, resolved "that the serjeant-at-arms do exclude Mr. Bradlaugh from the House until he shall engage not further to disturb the proceedings of the House." The plaintiff, having subsequently been informed by the Speaker that his exclusion would continue "until he should engage not to attempt to take the oath in disregard of the resolution of the House now in force," brought an action against the serjeant-at-arms in the High Court of Justice, in which he claimed:—(1), A declaration that the order of the House of July 9, 1883, was void, as being beyond the power and jurisdiction of the House to make. (2), An order restraining the serjeant-at-arms from using force to prevent the plaintiff entering the House and taking the oath as a member.

Judgment
of Lord
Coleridge,
C. J.

In delivering judgment upon demurrer to the above statement of claim, Lord Coleridge, C. J., observed that the admitted facts of the case raised the question whether, on the assumption that the resolution of the House of Commons forbade a member of the House within the walls of the House itself to do something which by the law of the land he had a right to do, such a resolution is one which the House of Commons has a right to pass; and whether, if not, the High Court can enquire into the right and allow an action

(*n*) 29 & 30 Vict. c. 19.

(*o*) As to which see May, Parl. Prac. 9th ed. 210—5; *Clarke v. Bradlaugh*, 7 Q. B. D. 38, 61;

Bradlaugh v. Clarke, 8 App. Cas. 354; and *per* Stephen, J., 12 Q. B. D. at p. 281.

to be maintained against the officer of the House charged with the execution of such order.

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After recapitulating the propositions established by the leading cases, the learned Chief Justice continued: "Alongside, however, of these propositions, for the soundness of which I should be prepared most earnestly to contend, there is another proposition equally true, equally well established, which seems to me decisive of the case before us. What is said or done within the walls of Parliament cannot be enquired into in a court of law. On this point all the judges in the two great cases which exhaust the learning on the subject (*p*) are agreed, and are emphatic. The jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive. . . . It is said that in this case the House of Commons has exceeded its legal powers, because it has resolved that the plaintiff shall not take an oath which he has a right to take, and the threatened force is force to be used in compelling obedience to a resolution in itself illegal; but there is nothing before me upon which I should be justified in arriving at such a conclusion in point of fact. . . . Even if the fact be as the plaintiff contends, it is not a matter into which this Court can examine. If injustice has been done, it is injustice for which the courts of law afford no remedy. . . . The history of England and the resolutions of the House of Commons itself show that now and then injustice has been done by the House to individual members of it. But the remedy, if remedy it be, lies not in an action in the courts of

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(*p*) *Burdett v. Abbott*, 14 East, 1, 148; *Stockdale v. Hansard*, 9 Ad. & Ell. 1.

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law (q), but by an appeal to the constituencies whom the House of Commons represents. It follows that this action is against principle, and is unsupported by authority, and therefore the demurrer must be allowed."

Stephen, J., observed, *inter alia*, as follows:—"I think that the House of Commons is not subject to the control of her Majesty's Courts in its administration of that part of the Statute Law which has relation to its own internal proceedings, and that the use of such actual force as may be necessary to carry into effect such a resolution as the one before us is justifiable. . . . The Parliamentary Oaths Act prescribes the course of proceeding to be followed on the occasion of the election of a member of Parliament. In order to raise the question now before us, it is necessary to assume that the House of Commons has come to a resolution inconsistent with the Act; for if the resolution and the Act are not inconsistent, the plaintiff has obviously no grievance. We must, of course, face this supposition, and give our decision upon the hypothesis of its truth; but it would be indecent and improper to make the further supposition that the House of Commons deliberately and intentionally defies and breaks the statute law. The more decent, and, I may add, the more natural and probable, supposition is that for reasons which are not before us, and which we are therefore unable to judge of, the House of Commons considers that there is no inconsistency between the Act and the resolution. They may think there is some implied exception to the Act. They may think that what the plaintiff proposes to do is not in

(q) As to this see *per* Lord Ellenborough and Bayley, J., 14 East, 150, 151, and 160, 161.

compliance with its directions. With this we have nothing to do; but whatever may be the reasons of the House of Commons for their conduct, it would be impossible for us to do justice without hearing and considering those reasons; but it would be equally impossible for the House, with any regard for its own dignity and independence, to suffer its reasons to be laid before us for that purpose, or to accept our interpretation of law in preference to its own. It seems to follow that the House of Commons has the exclusive power of interpreting the statute so far as the regulation of its own proceedings within its own walls is concerned, and that even if that interpretation should be erroneous this Court has no power to interfere with it, directly or indirectly.

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“No doubt the right of the burgesses of Northampton to be represented in Parliament, and the right of their duly-elected representative to sit and vote in Parliament, and to enjoy the other rights incidental to his position upon the terms provided by law are in the most emphatic sense legal rights, legal rights of the highest importance, and in the strictest sense of the words. Some of these rights are to be exercised out of Parliament, others within the walls of the House of Commons. Those which are to be exercised out of Parliament are under the protection of this Court, which, as has been shown in many cases, will apply proper remedies if they are in any way invaded and will in so doing be bound not by resolutions of either House of Parliament, but by its own judgment as to the law of the land, of which the privileges of Parliament form a part. Others must be exercised, if at all, within the walls of the House of Commons, and it seems to me that from the nature of the case such rights must

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be dependent upon the resolutions of the House. In my opinion the House stands with relation to such rights and to the resolutions which affect their exercise in precisely the same relation as we the Judges of this Court stand in to the laws which regulate the rights of which we are the guardians, and to the judgments which apply them to particular cases, that is to say, they are bound by the most solemn obligations which can bind men to any course of conduct whatever to guide their conduct by the law as they understand it. If they misunderstand it, or (I apologise for the supposition) wilfully disregard it, they resemble mistaken or unjust judges, but in either case there is in my judgment no appeal from their decision. The law of the land gives no such appeal, no precedent has been or can be produced in which any Court has ever interfered with the internal affairs of either House of Parliament though the cases are no doubt numerous in which the Courts have declared the limits of their powers outside of their respective houses" (r).

Though it may indeed appear at first sight difficult to reconcile some of the expressions used by the judges in the last mentioned case with the earlier decisions referred to in this note, it may nevertheless be confidently asserted that the constitutional doctrines concerning privilege remain as expounded in the principal cases by the Court of Queen's Bench in former days. And therefore to the following important questions:—Can the known and established laws of the land be superseded, suspended, or altered by resolution or order of the House of Commons?

(r) See further, upon the subject of privilege, the proceedings of the Irish House of Lords against

Chief Baron Gilbert and others, for acting judicially in opposition to the order of the House: 15 St. Tr. 1302.

Can that House in Parliament assembled, by any resolution or order, create any new privilege for themselves inconsistent with the known laws of the land? If such power be assumed by them, what security is there for the life, liberty, property, or character of the subjects of this realm? The constitutional lawyer will reply:—

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—

I. That a Court of Common Law is authorised, and may sometimes *ex necessitate rei* be required to weigh and test the validity of an asserted privilege of parliament.

Summary of
law as to
Parliamentary Privi-
lege

II. That the House of Commons cannot by resolution merely entitle itself to a new privilege.

III. That those who carry out ministerially the orders of the House may, if those orders have proceeded under a misconception as to privilege, expose themselves to the censures of the law.

This last proposition will be qualified in this way, that the cause of commitment by either House of Parliament for breach of privilege and contempt cannot be inquired into by Courts of Law, the adjudication that a contempt has been committed being a conviction, and commitment by the House being in consequence an execution (*s*); and that the Courts of Law will in no case interfere where the matter complained of is a matter relating to the

(*s*) The *Lex et consuetudo Parliamenti* applies exclusively to the Houses of Lords and Commons in England: it is not conferred upon a supreme legislative assembly of a colony or settlement by the introduction of the common law of England into that colony. Such an assembly therefore does not possess as a legal incident the power of arrest with a view of adjudication on a contempt committed out of the

House. See *Kielley v. Carson*, 4 Moo. P. C. C. 63; *Fenton v. Hampton*, 11 *Id.* 347; *Dill v. Murphy*, 1 Moo. P. C. 48; *Doyle v. Faulconer*, L. R. 1 P. C. 328; 36 L. J. P. C. 33; *Attorney-Gen. of New South Wales v. Macpherson*, L. R., 3 P. C. 258; 39 L. J., P. C. 59; *Speaker of the Legislative Assembly of Victoria v. Glass*, L. R., 3 P. C. 500; 40 L. J. P. C. 17; *Re Brown*, 33 L. J., Q. B. 193.

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internal management by the House of Parliament of its own procedure.

And here let us briefly recapitulate the leading principles enunciated in this Book.

As members of one great society, obedience is due from each of us to the Crown; not, indeed, a passive, unintelligent, obedience, but an obedience tempered and defined by law. In return for the obedience thus given, in requital of the fidelity thus pledged, certain inestimable privileges have been guaranteed to us—the privilege of enjoying personal liberty, of holding property without undue interference, of living unvexed by impositions, under a system of laws which cannot by the mere will of the Sovereign be dispensed with.

In the requirements of the executive is due from each of us a respectful acquiescence.

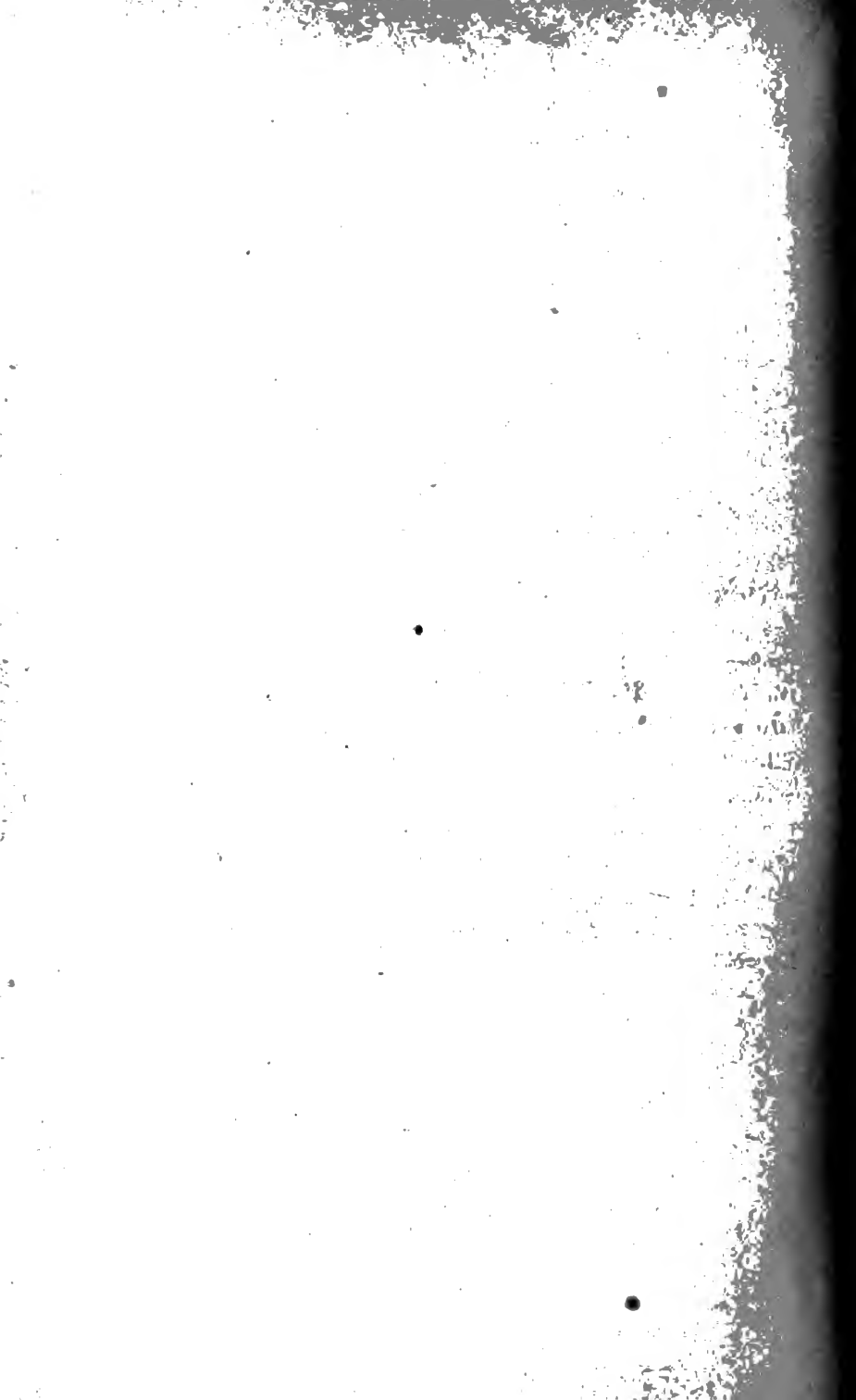
To Parliament, viewed as parcel merely of our legislative body, the relation of the subject is peculiar (*t*), Parliament being composed of two separate independent chambers, which, in assertion of their respective privileges, have ere now been moved with jealousy, not merely of each other, but of those for whose benefit they exist, and for whom they, conjointly with the sovereign, legislate; yet, if oppressed by this very potent portion of our legislature, the subject is not, in extreme emergency, defenceless; our law, whilst recognising the immemorial privileges of Parliament, declines to sanction its assertion of new privileges, and to one, suing for damages caused by such assertion, will extend relief.

The constitution of our country has thus far passed through three distinct phases, during the first of which a

(*t*) *Ante*, p. 799.

contest for supremacy was waged between the Sovereign and his feudatories; during the second, between the Sovereign and his people, as represented by the Lower House; during the third, between the Sovereign and the middle classes. In the first two of these stages the contest had to be decided by force of arms: during the last, by force of public opinion. Our constitution has now entered on a fourth stage of its existence, and, without vainly speculating as to the future, the constitutional historian may look forward with confidence, as he may look back with pride. Throughout eight centuries he may look back upon a never-ceasing struggle, the gradual advance of liberty, practical and theoretical—freedom of the person, secure enjoyment of property, liberty of the press—assured; the slow recession of the prerogative—the denial of its claim to imprison arbitrarily, to legislate exclusively, to tax at will. Dimmed though this retrospect be by gloomiest shades of bloodshed and of crime, by the turbulence and violence of anarchists, by the craft and wickedness of kings, its outline is still grand—no weightier story can elsewhere be read, nor has any passage yet been gathered from the annals of the world yielding for the cultured intellect a nobler lesson.

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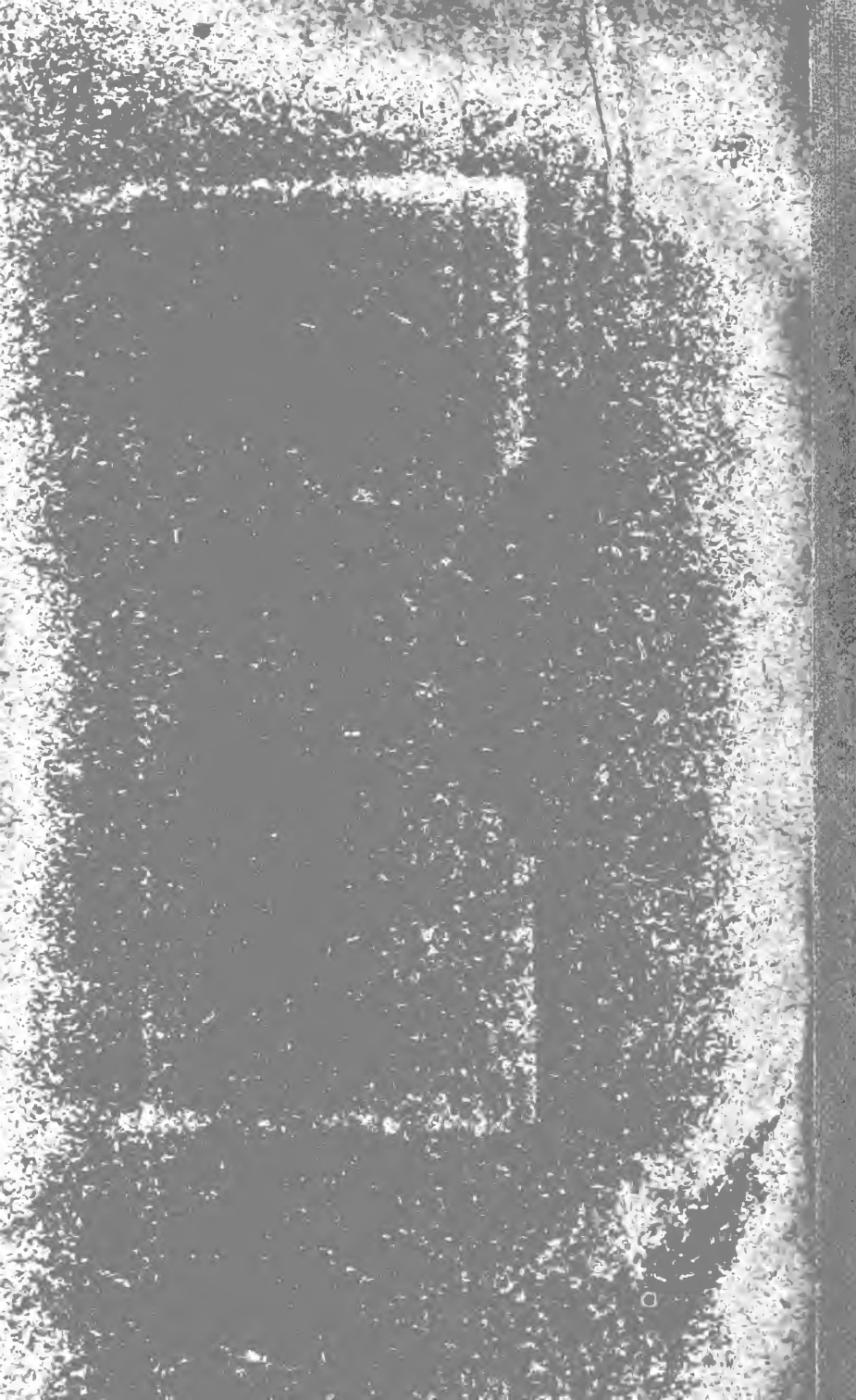
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